

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 197

NORFOLK AND WESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

W. G. CONLEY, ATTORNEY GENERAL OF THE STATE OF
WEST VIRGINIA, ET AL.

IN ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE
OF WEST VIRGINIA.

FILED JUNE 14, 1915.

(23,751)

(23,751)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 600.

NORFOLK AND WESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

v.

W. G. CONLEY, ATTORNEY GENERAL OF THE STATE OF
WEST VIRGINIA, ET AL.

IN ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE
OF WEST VIRGINIA.

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RECORD.

In Chancery. No. 2207.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation,

VS.

W. G. CONLEY, Attorney General of the State of West Virginia; George D. Moore, Prosecuting Attorney of the County of Jefferson; D. B. Hardwick, Prosecuting Attorney of the County of Wayne; S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo; Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer.

(Pleas before the Judge of the Circuit Court for the County of Kanawha, held at the Court House thereof, on the 15th day of March, 1913.

Be it remembered, that heretofore, to-wit: On the 14th day of August 1909, came the plaintiff, by its attorneys, and sued out of the Circuit Court Clerk's Office of Kanawha County, West Virginia, a summons in chancery, which summons with the return of the Sheriff endorsed thereon is in the words and figures following, to-wit:)

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Summons in Chancery.

The State of West Virginia to the Sheriff of Kanawha County, Greeting:

We command you that you summon W. G. Conley, Attorney General of the State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwick, Prosecuting Attorney of the County of Wayne, S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, if they be found within your bailiwick, to appear before the Judge of our Circuit Court for the County of Kanawha, at rules to be held in the Clerk's Office of said Court on the first Monday in September next to answer a bill in Chancery, exhibited against them in our said court, by Norfolk & Western Railway Company, a corporation, and have then there this writ.

Witness: Ira H. Mottesheard, Clerk of our said Court, at the Court House of said County, the 14th day of August 1909, and in the 47th year of the State.

IRA H. MOTTESHEARD, *Clerk.*

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NORFOLK & WESTERN RAILWAY COMPANY VS.

3

(Returns.)

Executed the within process on the within named Will G. Conley, Att'y General on the 24th day of Aug. 1909, by delivering to him in person, an office copy thereof.

S. P. SMITH, S. K. C.,
By S. C. HARLESS, D. S.

Executed the within writ on the 1st day of September 1909 by delivering a true copy thereof to Geo. D. Moore, Prosecuting Attorney of Jefferson County West Va. in person.

C. D. WYSONG, Sheriff,
By S. C. YOUNG, D. S.

Executed the within summons on D. B. Hardwick in Wayne Co. W. Va. this Aug. 19/09.

SAM J. CRIM, S. W. C.

Executed the within summons on the within named S. U. G. Rhodes, Prosecuting Attorney of Mingo County by delivering to him a true copy in Mingo County, W. Va. on the 28th day of Aug. 1909.

W. A. HURST,
Sheriff Mingo County.

4

Served the within Summons on the within named John R. Pendleton on the 20 day of Aug. 1909, in Mercer County, W. Va., by delivering to him in person a true office copy thereof.

I. J. ELLISON, S. M. C.

(And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 23rd day of August 1909.)

In Chancery. No. 2207.

NORFOLK AND WESTERN RAILWAY COMPANY

vs.

WILLIAM G. CONLEY, Attorney General, et al.

This day this cause came on to be heard upon the plaintiff's bill, and thereupon the defendant, William G. Conley, Attorney General of the State of West Virginia, made a special appearance to said bill, and tendered and filed his special written motion to dismiss the said bill for the reasons set out in said motion, which motion, after argument by counsel both for the plaintiff and the defendants, is overruled by the Court, and thereupon, without waiving said motion, the said defendant tendered his demurrer in writing to said bill, which is filed and set down for argument, and the said demurrer, being argued by counsel, is overruled, and the Court having

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maturely considered its allegations and being of the opinion therefrom that the Act of the Legislature of the State of West Virginia passed on the 20th day of February, 1907, approved by

the Governor February 24th, 1907, and taking effect ninety days from its passage, being Chapter 41 of the Acts of 1907, entitled "An act relating to and regulating passenger rates upon railroads in the State of West Virginia and prescribing penalties for the violation thereof," is unconstitutional and void, and that the plaintiff, the Norfolk and Western Railway Company, is entitled to an injunction against the defendants, William G. Conley, Attorney General of the State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwicke, Prosecuting Attorney of the County of Wayne, S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, as such attorneys and officers, enjoining them, and each of them, from enforcing said Act as prayed for in the plaintiff's bill of complaint: It is therefore adjudged, ordered and decreed that the defendants, William G. Conley, Attorney General of the State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwicke, Prosecuting Attorney of the County of Wayne, S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton,

6 Prosecuting Attorney of the County of Mercer, and all other persons and individuals whomsoever, be, and they and each of them are hereby enjoined, restrained and prohibited from instituting, or bringing, or causing to be instituted or brought, any action, suit, prosecution, or other proceeding, against the plaintiff, the Norfolk and Western Railway Company, or any of its officers, agents, or employes, to recover any fine, penalty, or damages, occurring or accruing under, or imposed by the said Act of the State of West Virginia, approved February 24th, 1907, hereinbefore referred to, and limiting the charge for the transportation of passengers, with ordinary baggage not exceeding one hundred pounds in weight, to the maximum sum of two cents per mile, or fractional part of a mile; and from instituting, or causing to be instituted any proceeding for mandamus, injunction, prohibition, or other proceeding, against the plaintiff, the Norfolk and Western Railway Company, or any officer, agent or employe of said plaintiff, to compel it to put into effect or observe said statute; also restraining and enjoining all other individuals, persons or corporations, now or hereafter claiming any right under or by virtue of said statute, from instituting, bringing or prosecuting any suit or suits against the plaintiff for the recovery of damages, or for any other cause of action, for the

7 plaintiff's failure to observe the requirements of said statute; and said defendants as aforesaid, and each of them, and any and all other persons, are also enjoined, restrained and inhibited from procuring, or attempting to procure, any indictment or indictments against the plaintiff, and from instituting criminal proceedings or prosecutions against it of any character because of its failure to observe and carry out the said two cent law, or because of any violation of said law by the plaintiff.

But it is further ordered that in the event the plaintiff shall put into

effect upon its line or lines any rate or rates for the transportation of intrastate passengers within the State of West Virginia, exceeding the rate named in the said Act of February 20th, 1907, entitled "An Act relating to and regulating rates upon railroads in the State of West Virginia and prescribing penalties for the violation thereof," the said plaintiff shall give to any person who travels between points on its line in the State of West Virginia at a rate exceeding two cents per mile a coupon or coupons, substantially in the words and figures following, to-wit:

"The Norfolk and Western Railway Company.
West Virginia Ticket Claim Coupon.
When Stamped by Issuing Agent.
To be Retained by Passenger.
Not Good for Passage.

Issued under the order of the Circuit Court of the County of Kanawha, in a suit in equity therein pending between the
8 Norfolk and Western Railway Company and W. G. Conley, Attorney General of the State of West Virginia, and others."

And that said coupon shall be of such form and number as that from it, in connection with the ticket or other evidence of transportation to which it corresponds, may be ascertained the sum to which such person shall be entitled in the event this order of this Court be set aside, vacated and reversed.

And it is further ordered that the plaintiff herein shall, until the further order of this Court, preserve and produce whenever so ordered by this Court all cancelled tickets or other evidence of transportation in respect of which coupons, as hereinbefore provided, may be outstanding, and shall, from time to time, as may be required by order of this Court so to do, report to the Court statements showing the revenue by it charged and collected for the intrastate transportation of passengers in the State of West Virginia in excess of the amount permitted by said Act of February 20th, 1907, as above referred to.

It is further ordered that a certified copy of this order from the records of this Court may be served upon the defendants, and each of them, with the same effect as if a formal writ of injunction had been issued pursuant to this order and served.

(The Bill of Complaint referred to in the foregoing order is in the words and figures following, to-wit:)

9 In the Circuit Court of Kanawha County, West Virginia.

NORFOLK AND WESTERN RAILWAY COMPANY, a Corporation,
Plaintiff,

VS.

W. G. CONLEY, Attorney General of the State of West Virginia,
et al., Defendants.

The bill of complaint of the Norfolk and Western Railway Company, a corporation, against W. G. Conley, Attorney General of the

State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwicke, Prosecuting Attorney of the County of Wayne, S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, defendants, filed in the Circuit Court of Kanawha County, West Virginia, being the County wherein the seat of Government of said State is:

The plaintiff complains and says:

1. That it has for some years last past owned and operated, and now owns and operates, a system of railroads in the States of Virginia, West Virginia, North Carolina, Kentucky, Ohio and Maryland, aggregating in main line and branches as of June 30, 1908, a total mileage of 1919.50 miles; that of this total mileage 240.76 of main line is located in the State of West Virginia, and 203.94 miles of branch lines therein, which mileage, both main and branch, is distributed among the following counties in said State as follows:

County.	Main line.	Branches.	Total.
Jefferson	18.46	.89	19.35
Wayne	58.23	62.89	121.12
Mingo	77.60	17.44	95.04
McDowell	54.36	79.25	133.61
Mercer	32.11	43.47	75.58
Total	240.76	203.94	444.70

2. That at the date of the passage of the Act hereinafter complained of, that is to say, on the 20th day of February, 1907, as well as at the time when the same went into effect, that is to say, on the 21st day of May, 1907, the property of this plaintiff in the State of West Virginia was valued and assessed for taxation by the Board of

Public Works of said State at \$31,000,051.45, and at the time of the passage of said Act and for a long time prior thereto this plaintiff charged for the transportation of persons within the State of West Virginia a rate per mile not to exceed that prescribed by Sections 2472 and 2473 of the Code of West Virginia of 1906, which passenger rate so charged by it was reasonable, just and lawful, and approximated a rate per mile of 2.94 cents and enabled the plaintiff to earn gross during the fiscal year ending June 30, 1907, from the transportation of intra-state passengers within the State of West Virginia, the sum of \$362,997.74; that the total gross earnings of the plaintiff from all sources within said State during the same period, including the earnings from the transportation of passengers within the State as aforesaid, were \$8,090,082.56; and that the total capital of the plaintiff as valued and assessed, apporportioned on the basis of the gross earnings as aforesaid between the earnings from the transportation of intra-state passengers within the State and the earnings from all sources within the State would show the investment of the plaintiff within the State for the fiscal year

ending June 30, 1907, and properly to be allotted to the transportation of intrastate passengers therein to have been \$1,391,902.31.

The plaintiff further avers that during the year aforesaid it managed its said railroad honestly and economically and that by said management it reasonably cost the plaintiff to earn the said
12 sum of \$362,997.74 from transporting passengers within the State approximately 85 cents to earn each dollar thereof; and that in consequence the return to it during said year from its capital embarked as aforesaid in the business of transporting intrastate passengers in West Virginia during said year was at the rate of 3-7/10 per cent per annum.

3. That the Legislature of the State of West Virginia, by an Act entitled "An Act Relating to and Regulating Passenger Rates upon Railroads in the State of West Virginia, and Prescribing Penalties for the violation thereof", passed February 20, 1907, approved by the Governor February 24, 1907, and to take effect ninety days from its passage; that is to say, on the twenty-first day of May, 1907, which said Act is Chapter 41 of the Acts of the Legislature of West Virginia, regular and extra sessions for the year 1907, and to which reference is here made, sought to limit the passenger fares of this plaintiff to two cents per mile by providing, among other things, "that all railroad corporations organized or doing business in this State under the laws or authority thereof shall be limited in their charges for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, to the sum of two cents per mile or fractional part of a mile", and by further providing that "any railroad company which shall charge, demand or receive
13 any greater compensation for the transportation of any passenger than is authorized by this Act shall be fined for each offense not less than fifty dollars nor more than five hundred dollars; provided that nothing contained in this Act shall apply to electric lines and street railways owned or operated in this State".

4. That this plaintiff has not at any time, and does not now operate within said State an electric line, or any such railway as is excepted from the provisions of the Act Aforesaid contained in Chapter 41 of the Acts of the Legislature of West Virginia, for 1907, but a steam railway of more than fifty miles in length, and that it has been before and since the passage of said Act, and is now, doing business in said State under the laws and authority thereof.

5. That immediately upon and going into effect of the Act aforesaid,—that is to say, upon the 21st day of May 1907,—this plaintiff put into effect on its line within the State of West Virginia the rates provided by said Act and has since kept the same in effect and has complied and is complying with said Act in not charging more than two cents per mile or fraction of a mile for carrying intra-state passengers over its line within the State of West Virginia; and it further says that the effect of said Act of 1907 has been as follows:

That during the fiscal year immediately following the date when said Act went into effect,—that is to say, from the 1st day of
14 July, 1907, to the 1st day of July, 1908,—the gross earnings derived from the transportation of intrastate passengers

within the State of West Virginia amounted to \$289,943.22, and the necessary expense incident to the earning of said \$289,943.22 was approximately 95 per cent thereof, or, in other words, it cost about 95 cents to earn each dollar of said amount, and, treating the capital invested within the State and devoted to the transportation of intra-state passengers therein as being the same for the year 1908 that it was for the year 1907, the net earnings for the fiscal year ending June 30th, 1908, derived from the transportation of intra-state passengers within the State approximated 1.04 per cent per annum on the plaintiff's capital invested in said State and allotted to the transportation of intra-state passengers therein.

And the plaintiff says that the actual capital of the plaintiff in the State of West Virginia during the fiscal year ending June 30th, 1908, and devoted to the transportation of intra-state passengers therein was not less than the capital invested therein during the year ending June 30th, 1907.

That during the fiscal year ending June 30th, 1909, the gross earnings derived from the transportation of intra-state passengers

15 within the State of West Virginia amounted to \$277,557.05 (nine months of said fiscal year is actual and the remaining three months is estimated) and the necessary expense incident to the earning of said \$277,557.05 was approximately 98.19 per cent thereof, or, in other words, it cost about 98.19 cents to earn each dollar of said amount, and, treating the capital invested within the State and devoted to the transportation of intra-state passengers therein as being the same for the year 1909, that it was for the year 1907, the net earnings for the fiscal year ending June 30th, 1909, derived from the transportation of intra-state passengers within the State approximated .38 of 1 per cent per annum on the plaintiff's capital invested in said State and allotted to the transportation of intra-state passengers therein.

And the plaintiff says that the actual capital of the plaintiff in the State of West Virginia during the fiscal year ending June 30th, 1909, and devoted to the transportation of intra-state passengers therein was not less than the capital invested therein during the year ending June 30th, 1907.

That the effect, therefore, of the said Act has been, and is, to reduce the rates and revenues of the plaintiff, and decrease its earnings from intra-state passenger business in the State of West Virginia

16 below what would be a reasonable compensation for the services rendered, and has been, and is, operating a confiscation of its property, in violation of the law of the land, in that it has deprived, and is depriving, the plaintiff of the rights, privileges and immunities guaranteed to it by the Constitution of the State of West Virginia contained in the following provisions of said instrument, viz:

(1) Section 9 of Article III of the Constitution of West Virginia, which provides that "Private property shall not be taken or damaged for public use without just compensation".

(2) Section 10 of Article III of the Constitution of West Virginia, which provides that "No person shall be deprived of life, lib-

erty or property without due process of law and the judgment of his peers."

And the plaintiff claims the benefit and protection of the said provisions of the Constitution of the State of West Virginia.

6. The plaintiff further says that, by Section 2 of the said Act of 1907, it is provided that any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by the said Act shall be fined for each offense not less than fifty dollars nor more than five hundred dollars, and the plaintiff is advised that the effect of said Act is to subject it to a maximum fine of five hundred dollars for each sale

of an intra-state passenger ticket in West Virginia at a rate exceeding two cents per mile, or for each act of any conductor in collecting from any passenger more than two cents per mile, or any act of its employees in disobedience of said Act; and the plaintiff says that, in the operation of its lines of railway in West Virginia, it receives and carries many hundreds of passengers every day, and that, by these enormous penalties, an attempt is made to prevent the plaintiff from securing any judicial inquiry into the validity of the Act, and that its penal provisions were enacted for the purpose of so burdening any challenge of the Act in the courts that the plaintiff and others affected thereby would be compelled to submit, as has been the case, to the confiscation worked by said Act; and the plaintiff is advised that the effect of these penalties is to deprive it of the equal protection of the law, and is a denial to the plaintiff of due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"; and this plaintiff claims the benefit and protection of the said provision of the Constitution of the United States and the laws passed in pursuance thereof.

18 7. The plaintiff further alleges that it is advised and therefore avers, that the said Act of the Legislature of the State of West Virginia, being Chapter 41 of the Acts of West Virginia of 1907, is also void as arbitrarily and artificially classifying railroads, such as this plaintiff, fifty miles in length and over in one class, and subjecting the same to the burdens and penalties of the Act, while exempting from such burdens and penalties all railroads under fifty miles in length; and this plaintiff avers and charges that this classification is in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as unreasonable, unjust and discriminating class legislation, which, as this plaintiff avers, appears upon the face of the Act itself.

8. The plaintiff further says that, unless this Honorable Court takes jurisdiction of and determines the question of the constitutionality of said Act of the Legislature of the State of West Virginia of 1907, and affords the plaintiff relief in respect thereto in this cause,

the work of confiscating its property through said Act, as hereinbefore set out, will either go on, or the number of actions or penalties to which this plaintiff will be exposed will be enormous, and the defense thereof difficult, if not impossible, and, in any event, the said

actions and penalties will be seriously and unjustly burdensome and expensive to this plaintiff, and will subject it to a multiplicity of indictments and suits and prosecutions for penalties, to its irreparable damage.

9. The plaintiff further shows that its purpose in this cause is, by an orderly proceeding in this court, to obtain a judicial determination of its rights under the Constitution of the State of West Virginia and under the Constitution and laws of the United States, and, if, as it is advised and believes, its just rights in the premises are imperiled, denied and encroached upon by the statute hereinbefore set forth, to obtain a judicial decree establishing and protecting its rights in the premises.

10. The plaintiff finally says that the defendant W. G. Conley is the Attorney General of the State of West Virginia, that the defendant George D. Moore is the Prosecuting Attorney of the County of Jefferson, the defendant D. B. Hardwicke is the Prosecuting Attorney of the County of Wayne, the defendant S. U. G. Rhodes is the Prosecuting Attorney of the County of Mingo, the defendant Robert R. Smith is the Prosecuting Attorney of the County of McDowell, and the defendant John R. Pendleton is the Prosecuting Attorney of the County of Mercer; all of which said Counties are located in and constitute political divisions of the said State of West Virginia, and that, under the Constitution and laws of said State, said defendants, (the Attorney General in The Supreme Court of

Appeals of the State, and said Prosecuting Attorneys each in his own County), are charged with the institution and conduct of all prosecutions such as are provided for in the Act of 1907 hereinbefore complained of, and that this plaintiff is informed and believes that said defendants, and each of them, within their respective spheres, intend to, and will, enforce the provisions of the said Act of 1907, against this plaintiff, unless they, and each of them be enjoined from so doing by this Honorable Court.

The plaintiff, therefore, prays that a writ of injunction may be issued out of this Court, restraining, enjoining and inhibiting the said defendants, and each of them, and all other individuals and persons whomsoever from instituting or bringing, or causing to be instituted or brought, any action, suit, prosecution or other proceeding against this plaintiff, or any of its officers, agents or employees, to recover any fine, penalty or damages occurring or accruing under or imposed by the said Act of the West Virginia Legislature approved February 24, 1907, hereinbefore referred to, limiting the charge for the transportation of passengers with ordinary baggage, not exceeding one hundred pounds in weight, to the maximum sum of two cents per mile or fractional part of a mile, or from instituting, or causing to be instituted, any proceeding for mandamus, injunction, prohibition or other proceeding against this plaintiff, or any of its officers, agents or employees, to compel the

21 plaintiff to put into effect or observe said statute; also restraining and enjoining all other individuals, persons or corporations, now or hereafter claiming any right under or by virtue of said statute, from instituting, bringing or prosecuting any suit or suits against the plaintiff for the recovery of damages, or for any other cause of action for the plaintiff's failure to observe the requirements of said statute; that the said statute may be declared to be null and void and of no effect, so far as it relates to the plaintiff's lines of railroad in the State of West Virginia hereinbefore set forth; that the said defendants as aforesaid, and each of them, may be enjoined, restrained and prohibited from procuring, or attempting to procure, indictments against the plaintiff, and from instituting criminal proceedings or prosecutions against it of any character because of its failure to observe and carry out the said two-cent law, or because of any violation of said law by the plaintiff; and that this plaintiff may have such other, further and general relief in the premises as the nature of its case requires and the Court may see fit to grant.

NORFOLK AND WESTERN RAILWAY
COMPANY,

By L. E. JOHNSON, *President*.

Attest:

[SEAL.]

H. W. GRIFFITH,

Ass't Secretary.

JOS. I. DORAN,
THEODORE W. REATH,
HOLT & DUNCAN,
Counsel.

22 STATE OF VIRGINIA,
City of Roanoke, To wit:

Joseph W. Cox, being duly sworn, says that he is the Comptroller of the Norfolk and Western Railway Company, the plaintiff in the bill of complaint attached hereto against the Attorney General of the State of West Virginia and others; that the facts therein set out are peculiarly within his knowledge as Comptroller of the plaintiff company; that all the facts stated in said bill and allegations therein contained are true, as he verily believes.

JOS. W. COXE.

Taken, subscribed and sworn to before me, the undersigned Notary Public in and for the City of Roanoke, State of Virginia, this 5th day of August, 1909.

[SEAL.]

GEO. N. DICKINSON,
Notary Public.

My commission expires on the 25th day of May 1910.

(Special Appearance and Motion to Dismiss referred to in the foregoing order is in the words and figures following, to-wit:)

23 In the Circuit Court of Kanawha County, West Virginia.

In Equity.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation,

v.

WM. G. CONLEY, Attorney General, et al.

This day specially appeared the defendant, Wm. G. Conley, Attorney General of the State of West Virginia, for the purpose only of moving, and he does hereby move, to dismiss the bill of complaint in the foregoing styled cause upon the ground that this suit is against the State of West Virginia without her consent and prohibited by the Constitution of said State, and for the further ground that the Circuit Court of Kanawha County does not have jurisdiction of this cause.

WM. G. CONLEY,

Attorney General, State of West Virginia.

(The Demurrer referred to in the foregoing order is in the words and figures following, to-wit:)

24 In the Circuit Court of Kanawha County, West Virginia.

In Chancery.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation,

vs.

WILLIAM G. CONLEY, Attorney General, et al.

The Demurrer of William G. Conley, Attorney General of the State of West Virginia, Defendant, to the Bill of Complaint of the Norfolk & Western Railway Company, Plaintiff.

This defendant, not confessing all or any of the matters or things in the bill of complaint in the above styled cause contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur to the bill and each paragraph and part thereof; and for causes of demurrer shows:

First. That the plaintiff's bill filed herein does not state any matter of equity entitling it to the relief prayed for against this demurrant or any of the defendants jointly or severally.

Second. That it appears from the bill that this cause is in truth and in effect a suit against the State of West Virginia without its consent, and therefore in violation of section 35 of article 6 of the Constitution of West Virginia.

25 Third. That the allegations in said bill are not sufficient to give jurisdiction to the circuit court of Kanawha county to hear and determine this cause.

Fourth. That it appears from the bill that this suit is in truth and

in effect a suit to enjoin the institution of criminal proceedings and to enjoin criminal prosecutions.

Fifth. That it also appears from the bill that the plaintiff has a plain, adequate and complete remedy at law; that it appears from the act itself complained of in said bill, that it is not in violation of any constitutional provision of the State of West Virginia or of the United States, nor is it in violation of any federal law regulating interstate commerce.

Sixth. That it appears from the bill that the same is filed and exhibited against the defendants named therein in their official capacity only; and that the relief sought against the defendants, jointly and collectively, is the restraint and control of their discretionary action, and each of them, in their official capacity; and that it further appears from the bill that the defendants named therein have no personal interest whatever in the proceedings.

Seventh. That the bill does not sufficiently set out the facts and figures therein to enable this demurrant or any of the defendants to ascertain from the bill whether or not the operation of said
26 Act of the Legislature, as applied to the complainant, is in violation of the Constitution of the State of West Virginia and the Constitution of the United States, as alleged by it.

Wherefore, for divers other good causes of demurrer appearing upon the face of the bill and in each paragraph and part thereof, this defendant demurs thereto, and prays the judgment of the court whether he shall be compelled to make any further or other answer to the bill, and humbly prays to be hence dismissed with his reasonable costs in this behalf expended, and as in duty bound he will ever pray.

WM. G. CONLEY,
Attorney General, State of West Virginia.

(And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 30th day of July 1910.)

In Chancery. No. 2207.

NORFOLK & WESTERN RAILWAY COMPANY
vs.
WILLIAM G. CONLEY, Attorney General, et al.

On this day, July 30, 1910, came the defendants and tendered to be filed their joint and separate answer to the bill of complaint herein, which answer is hereby filed, to which the
27 plaintiff replies generally. And there being some question by counsel whether the restraining order entered herein on the 23d day of August 1909, and of record in Chancery Order Book No. 32, page 164, is a temporary or a final order, therefore, and by the consent of the parties to this suit, the Court doth, adjudge, order and decree that said order was intended and shall be taken and treated as a temporary restraining order, and is subject to modification or to

be set aside in whole or in part by this Court. And thereupon the defendants moved the Court to dissolve said preliminary writ of injunction heretofore awarded herein and to redeem and pay for the coupons issued thereunder, but the plaintiff desiring to take testimony in support of its bill, the hearing of said motion is continued until the next regular term of this Court.

28 (The Joint and Separate Answer to the Bill of Complaint referred to in the foregoing order is in the words and figures following, to-wit:)

In Equity.

NORFOLK & WESTERN RAILWAY COMPANY

v.

WILLIAM G. CONLEY, *Attorney General, et al.*

The Joint and Separate Answer of William G. Conley, Attorney General of the State of West Virginia; George D. Moore, Prosecuting Attorney of the County of Jefferson; D. B. Hardwicke, Prosecuting Attorney of the County of Wayne; S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo; Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, all in said State of West Virginia, to the Bill of Complaint of the Norfolk & Western Railway Company, a Corporation, Filed Against Them in the Circuit Court of Kanawha County, said State.

To the Honorable Samuel C. Burdett Judge of said Circuit Court:

These respondents, reserving to themselves all right of exceptions to said bill of complaint, for answer thereto, or so much thereof as they are advised it is material for them to answer, jointly and severally answer and say:

I.

That these respondents believe it to be true, that the plaintiff for some years last past has owned and operated, and now owns and operates, a system of railroads in the States of Virginia, West
29 Virginia, North Carolina, Kentucky, Ohio and Maryland, aggregating in main line and branches as of June 30, 1908 a total of 1919.59 miles; and these respondents are informed, believe and aver that the miles of main track and branches, not including second main tract nor sidings, operated by the plaintiff for the years ending June 30, 1907, June 30, 1908, and June 30, 1909, with the percentage of said mileage in West Virginia compared with the total mileage in all states, was as follows:

	1907.	1908.	1909.
All States.....	1862.71	1919.59	1941.58
West Virginia.....	432.65	444.69	453.25
Percentage in West Va.....	23.23%	23.16%	23.34%

II.

That it is true, as alleged in paragraph two of the plaintiff's bill, that at the time the Act complained of (known as the Two Cent Passenger Act) was passed on the 20th day of February, 1907, and at the time said Act took effect on the 21st day of May, 1907, the property of the plaintiff located in the State of West Virginia was valued and assessed by the Board of Public Works of West Virginia at the sum of \$31,000,051.45; and these respondents aver, that an officer of the plaintiff company, acting under a duty imposed upon him by law, made, under oath, a detailed statement to said Board of Public Works of the true and actual value of all the property of the plaintiff in the State of West Virginia, and fixed said value at \$24,749,797.00, and which affidavit was in words and figures following, to-wit:

30

"Oath.

STATE OF VIRGINIA,

City of Roanoke, ss:

I, the undersigned, Joseph W. Cox, Comptroller of the Norfolk & Western Railway Company, on my oath say that the return as shown on the foregoing sheets, being Nos. 1, 2 and 3, and schedules Nos. 1, 2, 2a, 3 and the several divisions thereof, 4, 5, 6, 7, 7a, 8, 9-1, 9-2, 9-3, 9a, 9-b, 10, 11, 12, and 13 and each sheet thereof, and numbered 1 to — inclusive, has been prepared from the original books, papers and records of said Company; that I have carefully examined the same, and declare the same and each sheet thereof to be a complete and correct statement of the business and affairs of said Company in respect to each and every matter and thing therein set forth, and that all property owned, leased or operated in the State of West Virginia by said Company has been reported, and returned at its True and Actual Value, to the best of my knowledge, information and belief, the words "true and actual value" being understood by me to mean that price for which the beforementioned property would sell if voluntarily offered for sale, upon such terms as such property is usually sold, and not the price which might be realized if said property was sold at a forced sale; and I further say that no deductions were made before stating the gross earnings or receipts herein set forth, except those shown in the foregoing accounts; and that there have been no expenditures for Permanent improvements within the State

31 of West Virginia except as shown on schedule No. 12 of this report; and that there have been no expenditures for Permanent Improvements on the Entire Lines except as shown on schedule No. 12 of this report; and that the accounts and figures contained in the foregoing return embrace all of the financial operations of said Company during the period for which said return is made.

[SEAL.]

JOS. W. COXE,
Comptroller.

Subscribed and sworn to before me this 31st day of March, 1908.

JULIAN H. RUTHERFORD,

Notary Public.

(No tax.)

My Commission expires Dec. 10, 1908."

That it is true, said plaintiff had the legal right to charge the rate prescribed by sections 2472 and 2473 of the Code of West Virginia of 1906, but these respondents deny that said rate charged by the plaintiff was reasonable or just; and they deny that the average rate of fare per passenger per mile during the year ended June 30, 1907, approximated 2.94 cents, and they aver that said rate of fare was only 2.364 cents, as is shown by the sworn report of the plaintiff to said Board of Public Works and also by the annual report of the President of the plaintiff company to the stockholders thereof, to which reference is here made.

That it may be true, as alleged in paragraph two of the plaintiff's bill, that the gross earnings during the fiscal year ended June 30, 1907, from the transportation of intra-state West Virginia passengers was \$362,997.74; and it may be true that the total gross earnings of the plaintiff from all sources within the State of West Virginia during said year while the Three Cent Passenger law in said State was in force aggregated \$8,090,082.56; and it may be true, that the total capital of the plaintiff as valued and assessed in the State of West Virginia, to be allotted to the transportation of intra-state passengers within said state was \$1,391,902.31 if apportioned on the basis of the gross earnings as aforesaid between the earnings from the transportation of intra-state passengers within said State and the earnings from all sources therein; but these respondents deny on information and belief, that this is the proper method to apportion the same; and they deny that it reasonably cost the plaintiff eighty-five cents of each dollar of the said \$362,997.74 it claims to have earned in transporting intra-state passengers within said State to transport the same; and they further deny that the return to the plaintiff on said capital invested in the business of transporting intra-state passengers in West Virginia during said year ended June 30, 1907, was only at the rate of 3.7 per cent. per annum, but aver on the information set out in its reports to said Board of Public Works and to its stockholders for said year that the net return to the plaintiff on its capital invested in West Virginia in its passenger traffic business during said year was largely in excess of six per cent. per annum, after the payment of all taxes and other expenses and the expenditure of large sums for maintenance, equipment and improvements; and these respondents further aver, on information and belief (which information and belief are based upon said reports for said year) that, if the plaintiff honestly and economically managed its said business, the passenger traffic earnings received for business done within the State of West Virginia for said year would be sufficient to pay about 19 per centum per annum on said amount of \$1,391,902.31, and for the years ended June 30, 1908 and June 30, 1909, said earnings would be sufficient to pay slightly less than 19 per centum.

III.

That it is true, as alleged in paragraph three of the plaintiff's bill, that the Legislature of the State of West Virginia, by an Act passed the 20th day of February, 1907, which went into effect the 21st day of May, 1907, and known as chapter 41 of the Acts of the Legislature of West Virginia of 1907, limited the passenger fares of the plaintiff and all other companies owning or operating steam railroads over fifty miles in length within the State of West Virginia to a compensation of not exceeding two cents per mile or fraction thereof to each passenger with ordinary baggage; and it is also true that any railroad company violating said statute, upon conviction therefor, would be liable to a fine of not less than \$50.00 nor more than \$500.00 for each offense.

IV.

That it is true, as alleged in paragraph four of said bill, that the plaintiff does not now operate within the State of West Virginia an electric line, or any such railway as is excepted from the provisions of said chapter 41; and it is true that the plaintiff was then, and is now, doing business as a common carrier within said State.

V.

That these respondents believe it to be true, that the plaintiff, on the 21st day of May, 1907, put into effect on its lines within the State of West Virginia said Two Cent Passenger law, and kept the same in effect until the institution of these proceedings and the granting of the preliminary injunction herein on the 23d day of August, 1909; but these respondents deny that the application of said two cent law has limited the income from the intra-state passenger business within the State of West Virginia to approximately 1.04 per centum per annum on the amount of the plaintiff's capital invested in said State and allotted to the transportation of intra-state passengers therein, as set out in paragraph five of plaintiff's bill.

That it may be true, as alleged in paragraph five of said bill, that the actual capital of the plaintiff in the State of West Virginia during the fiscal year ending June 30, 1908, devoted to the transportation of intra-state passenger- therein was not-less than the capital invested therein during the year ending June 30, 1907, or \$1,391,902.31, but these respondents call for full proof thereof.

That these respondents are informed, believe and so charge, that it is not true, as alleged by the plaintiff, that the gross earnings derived from the transportation of intra-state passengers within the State of West Virginia amounted to only \$289,943.22 for the year ending June 30, 1908, but they aver that the gross earnings derived from said intra-state West Virginia passenger transportation was largely in excess of said amount for said year, and they here call for full and complete proof of its allegation; and they further deny, on information and belief, that the necessary expense incident to the earning of said \$289,943.22 was approximately 95 per centum thereof, but aver that the necessary expense was much less

than said amount, and here call for full proof of its allegation; and they further aver, that a proper and equitable apportionment of the passenger operating expenses incident to earning the sum of \$289,943.22, based upon the sworn report of the plaintiff to the Board of Public Works of said State for the year ended June 30, 1908, will show that net profits arising from the carrying of intra-state West Virginia passengers during said year, after the payment of taxes and all expenses and charges connected therewith, was largely in excess of six (6) per centum per annum on the capital or value of the property used and devoted to that purpose.

These respondents further deny, that the gross earnings derived from the transportation of intra-state passengers within the State of West Virginia for the year ended June 30, 1909, was only \$277,557.05 as alleged by the plaintiff in paragraph five of its bill of complaint, but aver that the amount of such gross earnings for said year, as sworn to by the plaintiff, was \$281,864.50, as is shown on
 36 sheet five of its annual return to the Board of Public Works for said year, to which reference is here made; and they further aver, that the total passenger fares for said year, allotted by the plaintiff to the State of West Virginia, as shown by said sheet five of said return, was \$623,804.31, and that the total passenger traffic earnings for said year, as so reported by the plaintiff and allotted to West Virginia, aggregated the sum of \$784,007.79, but these respondents aver, on information and belief, that the total passenger traffic earnings for said year in West Virginia were larger than said sum of \$784,007.79 and that such earnings for said year in said State amounted to nearly \$790,000.00.

These respondents deny, on information and belief, that the necessary expense incident to the earning of said alleged sum of \$277,557.05, was approximately 98.19 per centum thereof; and further deny that the net earnings for the fiscal year ended June 30, 1909, derived from the transportation of intra-state passengers within said State, approximated only 0.38 per centum on the plaintiff's capital invested in said State and allotted by the plaintiff in said bill of complaint to the transportation of intra-state passengers therein; but they aver that the plaintiff company realized in net earnings from its business of the transportation of intra-state West Virginia passengers for said year of 1909 on its property so invested, after the payment of taxes and all expenses and charges properly chargeable to said business, a sum largely in excess of six per centum.

But these respondents deny the legal or equitable right of the plaintiff to segregate the passenger earnings from the other
 37 earnings of the plaintiff in determining whether said Two Cent Passenger law operates as a confiscation of its property, and they aver that the entire earnings of the plaintiff from all sources should be considered in connection therewith.

VI.

These respondents admit that said Two Cent Passenger law provides that any company violating said law, upon conviction, shall be

fined not less than fifty dollars nor more than five hundred dollars for each offense, but they deny that the penalty therein provided was made to prevent the plaintiff, or any other corporation, from securing a judicial inquiry into the validity of said law; and they deny that the penal provisions of said law were enacted for the purposes of "burdening any challenge" thereof in the courts; and they further deny that the effects of said penalties upon the plaintiff is to deprive it of the equal protection of the law and of the due process of law; and they deny that it is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, as alleged in paragraph six of the plaintiff's bill of complaint.

VII.

These respondents deny, on information and belief, that said chapter 41 of the Acts of the Legislature of West Virginia of 1907 is void as "arbitrarily and artificially" classifying railroads, as alleged in paragraph seven of the plaintiff's bill of complaint; and they deny that the classification contained in said law is in violation of

38 the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and they deny that said classification contained therein is unreasonable, unjust or discriminating class legislation; but on the contrary, these respondents aver, on information and belief, that said chapter 41 is in all respects valid on its face, and that the classification therein contained is just and reasonable and based upon reasonable differences.

VIII.

These respondents deny the right of the plaintiff to prevent the enforcement of the law complained of, through equity by injunction, enjoining these respondents from performing their official duties thereunder; and they further deny that said law works a confiscation of the plaintiff's property, and deny that the defense of the criminal prosecutions against it for a violation of said law is more difficult to the plaintiff than the prosecution of this suit, and deny that the penalties for such violation would be "unjustly burdensome and expensive;" and they further deny that such prosecutions would work irreparable damage to the plaintiff.

IX.

These respondents deny, on information and belief, that the rights of the plaintiff are in any manner "imperiled, denied and encroached upon" by said law, and again deny the right of the plaintiff to test the constitutionality thereof in these proceedings.

X.

These respondents admit that the defendant, William G. Conley, is the Attorney General of the State of West Virginia; that the defendant, George D. Moore, is the Prosecuting

39

Attorney of Jefferson County; that the defendant, D. R. Hendricks, is the Prosecuting Attorney of Wayne County; that the defendant, S. U. G. Rhodes, is the Prosecuting Attorney of Mingo County; that the defendant, Robert R. Smith, is the Prosecuting Attorney of McDowell County, and the defendant, John R. Pendleton, is the Prosecuting Attorney of Mercer County; and that all of said counties are located within and form a part of the State of West Virginia, and that it would be the official duty of said prosecuting attorneys in their respective counties to institute and prosecute criminal proceedings against the plaintiff and other railroad companies violating the law complained of, and that it would be the official duty of the attorney general to prosecute such proceedings in the Supreme Court of Appeals of West Virginia, if appealed to that Court.

XI.

These respondents still further deny the legal or equitable right of the plaintiff to segregate its passenger business from that of its freight and other business, or to divide any of its earnings from any source or sources, in determining the constitutionality of said Act, and they aver that the entire earnings from all sources should be considered in connection therewith.

These respondents aver, that the gross earnings of the plaintiff from its operations within the State of West Virginia for the year ended June 30, 1907, as reported under oath by the plaintiff to said Board of Public Works were \$8,000,002.56, and that the operating expenses, including taxes for said year, after excluding the value of permanent improvements charged by the plaintiff to operating expenses, were \$5,677,005.17, leaving to the plaintiff net earnings from operations in West Virginia the sum of \$2,412,087.39, which net earnings are more than 9.74 per centum on \$24,749,797.00,—the grand total of the true and actual value of all the plaintiff's property located within the State of West Virginia for said year, as shown by said report, to which reference is here made.

These respondents aver, that the gross earnings of the plaintiff from operations within the State of West Virginia for the year ended June 30, 1908, as reported under oath by the plaintiff to said Board of Public Works, were \$7,429,554.14; and that the operating expenses, including taxes for said year, after excluding the value of permanent improvements charged by the plaintiff to operating expenses, were \$5,361,973.83 leaving to the plaintiff net earnings from operations in West Virginia the sum of \$2,067,580.31, which net earnings are more than 8 per centum on \$25,722,340.00, the grand total of the true and actual value of all the plaintiff's property located within the State of West Virginia for said year, as shown by said report, to which reference is here made.

These respondents still further aver that the gross earnings of the plaintiff from operations within the State of West Virginia for the year ended June 30, 1909, as reported under oath by the plaintiff to said Board of Public Works were

\$7,759,987.98, and that the operating expenses, including taxes for said year, within said State, after excluding the value of permanent improvements charged by the plaintiff to operating expenses, were \$5,189,293.38, leaving to the plaintiff net earnings from operations in West Virginia the sum of \$2,570,694.60, which net earnings are more than 9.3% on \$27,629,865.00,—the grand total of the true and actual value of all of its property located within the State of West Virginia for said year, as shown by said report, to which reference is here made.

These respondents further aver, on information and belief, that the said net earnings of \$2,412,087.39 in West Virginia for the year ended June 30, 1907 is 7.98 per centum on \$31,000,000.00, the value of the plaintiff's property in said State for said year as fixed by said Board of Public Works, and that it is 9.74 per centum on \$24,749,797.00, the grand total of the value of all its property in said State for said year as fixed by the plaintiff in its sworn return to said Board of Public Works; that the said net earnings of \$2,067,570.31 in West Virginia for the year ended June 30, 1908 is 6.26 per centum on \$33,000,000.00, the value of the plaintiff's property in said State for said year as fixed by said Board of Public Works, and that it is 8.04 per centum on \$25,712,786.00, the grand total of the value of all its property in said State for said year as

fixed by the plaintiff in its sworn return to said Board; that
42 the said net earnings of \$2,570,694.60 in West Virginia for the year ended June 30, 1909 is 8.03 per centum on \$32,000,000.00, the value of the plaintiff's property in said State for said year as fixed by said Board of Public Works, and that it is 9.3 per centum on \$27,629,865.00, the grand total of the value of all its property in said State for said year as fixed by the plaintiff in its sworn return to said Board. And these respondents further aver, on information and belief, that said respective sums of net earnings for each of said years is the sum left after deducting from the gross earnings of the plaintiff all taxes and all expenses and all charges for operations, and for maintenance and betterments of its said roadways, tracks and other property, including its rolling stock, (which were the net earnings left after the deduction of an undue amount charged by the plaintiff against that portion of the business in West Virginia) and these respondents aver, that from these net earnings the plaintiff was enabled to pay in each of said years large dividends on the market value of its stock and the interest on all of its debts, and in addition thereto to set aside a large surplus fund.

These respondents still further aver, that any material decrease which may have resulted in both the freight and passenger earnings of the plaintiff during the year ended June 30, 1908, was caused by the general depression in business throughout the country and not because of the enforcement of the Two Cent Passenger law complained of; and they further aver, on information and belief, that both the freight and passenger earnings of the
43 plaintiff very materially increased during the year ended June 30, 1910 over the years ended June 30, 1908 and June

30, 1909, because of the substantial increase in general business conditions.

These respondents still further aver, that each and all of them are citizens and taxpayers of their respective counties and of the State of West Virginia, and as such are a part of the traveling public and frequently travel as passengers on the railroad of the plaintiff, and especially on that part of said railroad located in the State of West Virginia; and that the passenger rate per mile now being charged by the plaintiff for intra-state West Virginia transportation is unfair and unreasonable for the property used in connection therewith and for the services rendered; and they say that said preliminary injunction, issued by this court herein on the 23d day of August, 1909, ought to be dissolved in right and justice to these respondents and to the traveling public generally, and a rate restored not exceeding that provided in said Two Cent Passenger Law; and that plaintiff ought to be compelled to redeem and pay for all the coupons issued by it under said order of this Court.

Prayer.

And now, having answered said bill as fully as these respondents are advised it is material for them to answer, they pray that said preliminary injunction issued herein on the 23d day of August, 1909, may be dissolved as to each and all of them; that the bill in these proceedings be dismissed; that a decree be entered compelling the plaintiff to receive, redeem and pay for as presented to it, or to its agents or officers, the coupons issued by the plaintiff under said order of this Court entered on said 23d day of August, 1909; that a mandatory injunction be issued herein against the plaintiff to these respondents and to all other citizens and taxpayers of West Virginia and the traveling public generally, commanding the plaintiff to restore an intra-state West Virginia passenger charge per passenger per mile of not exceeding two cents for each mile or fraction thereof, as provided in said law; that the plaintiff be enjoined from further violating said chapter 41 of the Acts of the Legislature of West Virginia of 1907, and that these respondents recover of and from the plaintiff, the Norfolk & Western Railway Company, their costs in this behalf most wrongfully expended. And as in duty bound they will ever pray, etc.

WM. G. CONLEY,

Attorney General, State of West Virginia.

GEORGE D. MOORE,

Prosecuting Attorney, Jefferson County.

D. B. HARDWICKE,

Prosecuting Attorney, Wayne County.

S. U. G. RHODES,

Prosecuting Attorney, Mingo County.

ROBERT R. SMITH,

Prosecuting Attorney, McDowell County.

JOHN R. PENDLETON,

Prosecuting Attorney, Mercer County.

WM. G. CONLEY,

Attorney General.

45 STATE OF WEST VIRGINIA,
County of Kanawha, To wit:

William G. Conley, one of the defendants named in the foregoing answer, being duly sworn says that the facts and allegations therein contained are true except so far as they are therein stated to be on information, and that so far as they are therein stated to be upon information he believes them to be true.

WM. G. CONLEY, *Defendant.*

Taken, sworn to and subscribed before me in my said county of Kanawha, this the 26th day of July, 1910.

J. L. HEIZER, *Notary Public.*

My Commission expires Sept. 26, 1919.

46 (And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 10th day of November 1910.)

In Equity. No. 2207.

NORFOLK & WESTERN RAILWAY COMPANY

VS.

WM. G. CONLEY, Attorney General, et al.

On this, the 10th day of October, 1910, came again the parties, by Holt & Duncan, of counsel for the plaintiff, and William G. Conley, Attorney General for the State of West Virginia, counsel for the defendants, and, by consent of parties, both plaintiff and defendant, the original bill herein is now amended by inserting therein, at the conclusion of the sixth paragraph thereof, the words and figures following, to-wit:

"And the plaintiff further avers that the reduction hereinbefore set forth of its revenues by the Act aforesaid has operated, and would operate, as a confiscation of its property, in violation of the Fourteenth Amendment of the Constitution of the United States."

And the Clerk of this Court is directed to interline said words in said bill.

And, by consent of parties, both plaintiff and defendant, the original answer filed in this cause is now here amended, by inserting therein, at the conclusion of the sixth paragraph thereof, the words and figures following, to-wit:

"And these respondents still further deny, upon information and belief, that the operation of the Act complained of results in the reduction of the plaintiff's revenue to the extent that it works a confiscation of its property in violation of the Fourteenth Amendment of the Constitution of the United States."

And the Clerk of this Court is directed to interline said words in said answer at the conclusion of the sixth paragraph thereof.

(Depositions on Behalf of Plaintiff, Filed in Kanawha Circuit Court Clerk's Office, Kanawha County, West Virginia, on the 12th Day of February, 1913.)

49 In the Circuit Court of Kanawha County, State of West Virginia.

In Equity.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,
v.
W. G. CONLEY, Attorney General of the State of West Virginia,
et al., Defendants.

Depositions of Jos. W. Coxé, and Others, taken before me, Carl B. Short, a Notary Public in and for the City of Roanoke, in the State of Virginia, pursuant to the notice hereto annexed, at the law office of Lucien H. Cocke, Esq., in the Office Building of the Norfolk & Western Railway Company in the City of Roanoke, State of Virginia, on the third day of October, 1910, between the hours of nine o'clock A. M. and six o'clock P. M., to be read as evidence in behalf of the Norfolk & Western Railway Company in a certain suit in Equity pending in the Circuit Court of Kanawha County, State of West Virginia, wherein the Norfolk & Western Railway Company is plaintiff and W. G. Conley, Attorney General for the State of West Virginia, and others, are defendants.

Present: Theodore W. Reath, Esq., Lucien H. Cocke, Esq., Hon. John H. Holt, Attorneys for Plaintiff.

50 There being no appearance for the defendants, and upon the request of W. G. Conley, Esq., Attorney General of the State of West Virginia, being one of the defendants and counsel for himself and the other defendants, the taking of these depositions is continued until tomorrow, at the same place and between the same hours.

CARL B. SHORT, [SEAL.]
Notary Public.

My commission expires October 7th 1912.

Law Office of Lucian H. Cocke, Norfolk & Western Railway Building.

ROANOKE, VA., *October 4th*, 1910.

Pursuant to the adjournment of yesterday, the taking of these depositions was resumed as follows:

Present:

Theodore W. Reath, Esq., Lucian H. Cocke, Esq., Hon. John H. Holt, Attorneys for Plaintiff.

Hon. W. G. Conley, Attorney General of the State of West Virginia, Attorney for Defendants.

JOSEPH W. COXE, a witness of lawful age, being first duly sworn, deposes as follows:

51 Examination by

Hon. JOHN H. HOLT:

Q. 1. What is your name, age, residence and occupation?

A. Joseph W. Coxе; age 56; residence, Roanoke, Virginia; occupation, accountant.

Q. 2. What official position, if any, do you now hold with the plaintiff, the Norfolk & Western Railway Company?

A. I am the Comptroller of the Norfolk & Western Railway Company.

Q. 3. How long have you occupied that office?

A. Since 1904.

Q. 4. What was your business, Mr. Coxе, prior to that time?

A. I was general auditor of the Norfolk & Western Railway Company for about two years.

Q. 5. And before you became auditor, what did you do?

A. I was auditor of receipts of the Norfolk & Western Railroad from about 1883 to 1896; afterwards auditor of receipts of the Norfolk & Western Railway Company.

Q. 6. Are you familiar with the mileage of the Norfolk & Western Railway Company and the states through which it runs?

A. Yes sir.

Q. 7. You may state through what states it operates a system of railway.

A. The Norfolk & Western Railway Company operates a system of railway through the states of Virginia, Maryland, North
52 Carolina, West Virginia, Kentucky and Ohio.

Q. 8. Can you tell us the aggregate mileage of the system?

A. The aggregate mileage of the system in 1907, main line and branches, was 1,862.71.

Q. 9. What was it June 30th 1908?

A. The total of main line and branches was 1,881.89 miles.

Q. 10. Tell us, please, how much of this mileage was then and is now located in the state of West Virginia, main line and branches.

A. For the year ending June 30th 1907, the total mileage in West Virginia was 432.65, of which the main line represented 240.75, and

the branches 191.90, the branches representing a percentage of 44.2 of the entire mileage of the state.

Q. 11. What was the West Virginia mileage at the end of the fiscal year June 30th 1908?

A. June 30th 1908, the mileage in West Virginia was 444.69, of which the main line was 240.75 and the branches 203.94, the percentage of branches being 45.9.

Q. 12. You may state who makes return to the Board of Public Works for the State of West Virginia of the properties of the Norfolk & Western Railway Company within that state for the purposes of assessment?

A. The report to the State of West Virginia of the property of the Norfolk & Western Railway in that state for purposes of
53 assessment is prepared under my supervision.

Q. 13. Are you familiar with the assessment of its property in that state for the year 1907?

A. I am.

Q. 14. Please give us the total of that assessment for that year.

A. The total of the assessment of the year 1907 of the property of the Norfolk & Western Railway was \$31,000,051.45.

Q. 15. You may tell us whether or not you were familiar with the rate of transportation charged by that road for passengers in the state of West Virginia during the early part of the year 1907, and for some time prior thereto?

A. I am.

Q. 16. What was the transportation rate per mile for passengers in that state during the early part of the year 1907?

A. Up to the 21st of May, 1907, the rate was three cents per mile.

Q. 17. What was it after that time, if anything different, and for what period of time?

A. In accordance with an act of the Legislature the rate was made two cents per mile, effective May 21st, 1907, and continued in effect until September 15th 1909.

Q. 18. By the act of what State Legislature was this two-cent passenger rate established?

54 A. The Legislature of West Virginia.

Q. 19. When does the fiscal year of your company end?

A. The fiscal year of our company ends with June 30th of each year.

Q. 20. Please tell us, if you know, what the gross earnings of the Norfolk & Western Railway Company were from the transportation of intra-state passengers within the state of West Virginia for the year ending June 30th 1907?

A. The gross revenue from transportation of West Virginia intra-state passengers for the year ending June 30th 1907 was \$362,997.74.

Q. 21. What, if you know, were the total gross earnings during the same period of the Norfolk & Western Railway Company from all sources within the State of West Virginia, including the earnings from the transportation of passengers within the state as aforesaid?

A. The gross earnings of the Norfolk & Western Railway in West

Virginia including both intra-state and interstate passengers and freight for the year ending June 30th 1907, was \$8,090,082.56.

Q. 22. What was the total capital, if you know, of the plaintiff within the state of West Virginia for the fiscal year ending June 30th 1907, and allotted to the transportation of intra-state passengers therein?

A. The total capital in the state of West Virginia for the year ending June 30th 1907, and allotted to the transportation of intra-state passengers was \$1,391,902.31.

55 Q. 23. How do you ascertain that fact, Mr. Cox?

A. The total capital employed in the state of West Virginia in the transaction of all business, passenger and freight intra-state and inter-state, was \$31,000,051.45. This total capital was allotted to the several classes of business, intra-state and inter-state passengers, intra-state and interstate freight, on the basis of gross earning. The gross passenger revenue, \$362,997.74 represents 4.49% of the entire gross earnings in the state from all sources. These entire gross earnings were \$8,090,082.56, and \$362,997.74 represented 4.49% of these total gross earnings. This 4.49% is applied to the entire capital in the state of \$31,000,051.45, producing the capital which is allotted to the transportation of intra-state passengers, that is, \$1,391,902.31.

Q. 24. When you state that the gross earnings from passengers is \$362,997.74, do you mean intra-state passenger service?

A. The transportation of intra-state passengers exclusively.

Q. 25. You may state, if you know, what it cost the Norfolk & Western Railway Company per dollar to earn the amount you have stated to be its gross earnings for intra-state passenger service within the state of West Virginia for the fiscal year ending June 30th 1907?

A. For the year ending June 30th 1907, the cost to earn a dollar of intra-state passenger revenue was 85.68 cents, including taxes.

56 Q. 26. What was it, Mr. Cox, if you know, exclusive of the payment of taxes?

A. Exclusive of taxes the cost to earn a dollar was 82.20 cents.

Q. 27. What then, if you know, was the return to the railway company during the fiscal year ending June 30th 1907 from its capital so devoted to the business of transporting intra-state passengers during said year in the state of West Virginia?

A. For the year ending June 30th 1907, the capital allotted to the transportation of intra-state passengers was \$1,391,902.31, and the return thereon was 3.73 per cent. which, however, omits from all consideration the expenditures for additions and betterments charged to Income. If those additions and betterments are included then the rate on the capital would be 2.15 per cent.

Q. 28. During what portion of that fiscal year was three cents per mile charged for intra-state passenger service in West Virginia?

A. The three-cent rate prevailed from July 1st 1906 to May 20th 1907. I think the two-cent rate went into effect on the 21st.

Q. 29. And what was the rate then during the balance of that year?

A. From May 21st to June 30th, the intra-state passenger rate was two cents.

57 Q. 30. Please tell us in detail how you arrive at the figure as stated by you that it cost during the fiscal year before mentioned 85 cents to earn every dollar of the gross receipts from intra-state passenger service in West Va.?

A. Under our system of accounting we separate our expenses into passenger and freight. The entire passenger expenses in the state of West Virginia were \$816,528.76. These expenses are sub-divided between the intra-state and inter-state on the basis of gross earnings. We find that the total expenses in the state, exclusive of Taxes, \$816,528.76, represent 82.2 per cent. of the entire passenger earnings. This 82.2 per cent would, therefore, apply to the gross earnings from intra-state passengers, assuming that the cost of inter-state and intra-state transportation is the same.

Q. 31. As a matter of fact, how do the expenses of intra-state and inter-state passenger service compare?

A. Under our system of working our accounts we do not attempt to differentiate between the cost of intra-state and inter-state. As a general proposition, however, I would state that the intra-state is more expensive to handle than the inter-state.

Q. 32. You may state whether or not your Company in its book-keeping and accounts separates passengers from freight earnings?

58 A. Under our system of accounting we carefully separate our passenger, freight and miscellaneous earnings, and our records will show such separation.

Q. 33. How long has it been the practice of the Norfolk & Western Railway Company to keep its accounts according to this system?

A. The separation of passenger and freight earnings, as well as miscellaneous earnings, has been in effect from the time of the organization of the Norfolk & Western Railway and subsequently by the Norfolk & Western Railway up to the present time.

Q. 34. You may likewise state, if you know, whether or not it has kept and now keeps its expenses separate, that is to say, the freight expenses and passenger expenses.

A. The Norfolk & Western Railroad from the time of its organization has invariably kept the passenger and the freight expenses separately; that not only applies to the Railway Company, but to its predecessor, the Railroad Company.

Q. 35. How is this done, Mr. Coxe?

59 A. All bills providing for the payment of company funds for materials and pay rolls for labor are accompanied by data showing each account charged and each operating district, or operating division to which the disbursement shall be distributed. Where the disbursement is of a general character, such as the pay of general officers, and for the benefit of the entire line, such amounts are distributed over the several operating districts on the basis of loaded and empty car mileage. In making up charges on bills and pay rolls, items which are clearly located to either passenger or

freight are so charged, and where the item is of a general character which cannot be located directly to passenger or freight, the division is made on the basis of engine miles, thus in the year ending June 30th 1907, the freight engine miles were 14,890,615, and the passenger engine miles were 3,796,119, the percentage of passenger being 20%. Every bill entering the accounts of any one month after having the expense account noted thereon as well as the operating division over which it has been distributed, is entered on the summary sheet, first, according to the expense account number, secondly, according to the sub-division of passenger, freight or general, and third, to the operating district. To accomplish this work each month requires some 56 sheets of paper 17 by 13, a separate and distinct account being kept of each month in the year. The various expense accounts to which such expenses are distributed are 116 in number. The Maintenance of Way has 23 primary accounts, Maintenance of Equipment has 29 primary accounts, Traffic Expenses has eight primary accounts, Conducting Transportation has 45 primary accounts, and General Expenses has 11 primary accounts. The operating expenses covered by these 116 primary accounts are thus distributed over five grand divisions, these divisions being Norfolk Division, Shenandoah Division, Rad-

ford Division, Pocahontas Division, and the Scioto Division, 60 the total trackage of all these divisions being 1,862.71 miles.

Having thus determined the amount of expenses coming under each primary account and sub-divided by passenger and freight, the proportion shown to be charged to each district is chargeable to the state in which the division is located, and where the division is located in two or more states, the expenses are divided on the basis of state mileage. Thus, the Shenandoah Division from Roanoke to Hagerstown, 244.16 miles has 209.23 miles in Virginia, or 85.69% of the entire mileage; the state of West Virginia has 19.35 miles, or 7.93% of the entire mileage of the Division, and Maryland has 15.58 miles, or 6.38% of the entire mileage of the division; so that the expenses of this division would be charged, to Virginia 85.69%; West Virginia 7.93%, and Maryland 6.38%. Similarly on the Radford Division, Roanoke to Bluefield the total distance is 105.74 miles; 85.19 miles are in Virginia, representing 80.60%, and 20.55 miles are in West Virginia, representing 19.40%; so that the expenses of this division to be allotted to Virginia are 80.60%, and 19.40% to West Virginia. Similarly, the Pocahontas Division, Bluefield to Williamson, 237.75 miles, has 7.14 miles in Virginia, or 3.03%, and 230.61 miles in West Virginia, or 96.97%; so that the expenses of this division from Bluefield to Williamson to be charged to Virginia are 3.03%, and to West Virginia 96.97%. Similarly with the Scioto Division from Williamson to Portsmouth, we have

161.84 miles in West Virginia, a percentage of 80.58; and 61 39 miles in Ohio, representing a percentage of 19.42; so that the expenses of the line from Williamson to Portsmouth would be chargeable to the state of West Virginia 80.58%, and the state of Ohio, 19.42%. As an indication that care is observed in the separation of passenger and freight, reference is made to the account

"Fuel for Road Locomotives" for the year ending June 30th 1907, and allotted to West Virginia fuel for passenger engines, \$30,413.16, and fuel for freight locomotives \$326,874.63, the percentage of passenger being 8.5; whereas, if the entire fuel for road locomotives was divided on the mileage of engines the charge to the passenger operating expense would have been on the basis of 20%; similarly with Road Trainmen in West Virginia for the year ending June 30th, the passenger road trainmen was \$57,776.09; the freight road trainmen was \$403,069.13; the percentage of passenger being 12.6%; whereas a division on the basis of engine miles would be 20%. Taking the entire expense for the year 1907 in West Virginia, \$5,403,767.10, and applying the percentage on engine mileage, 20%, would yield expense allotted to West Virginia \$1,080,753.42; whereas the expense as divided in accordance with our system of accounting was \$816,528.76, or but 15.1% of the entire expense; these illustrations being given simply to show that an endeavor is made to separate all expenses carefully and clearly between passenger and freight.

62 Q. 36. Mr. Coxe, you have stated that this company has 116 primary accounts, I believe you called them?

A. Yes sir.

Q. 37. Primary expense accounts?

A. Yes sir.

Q. 38. Take the paper now handed you and tell us what it is. (Handing paper to witness.)

A. The statement now before me is Comptroller's Form 26, upon which is summarized each month the expenses of each grand operating division between passenger and freight.

Q. 39. Is that, or is it not, a list of the primary expense accounts to which you have referred?

A. It first shows that principal accounts of Maintenance of Way and Structures, Maintenance of Equipment, Traffic Expenses, Conducting Transportation, and General Expenses. It then shows with the primary accounts under of Maintenance of Way and Structures, from one to 23, under Maintenance of Equipment from 24 to 52 inclusive, Traffic Expenses from 53 to 60 inclusive, Conducting Transportation from 61 to 105 inclusive, and General Expenses from 106 to 116 inclusive.

Q. 40. Will you file that with and as a part of your deposition, marking it Exhibit "A"?

A. I herewith file Comptroller's Form No. 26 as Exhibit "A."

63 Q. 41. You may tell us whether or not other railroads, if you know, observe this same or any like system of separating operating expenses according to whether they are devoted to passenger or freight and incur the expenses incident to such separation and bookkeeping?

A. The separation of operating expenses as between passenger and freight means a considerable amount of clerical labor and additional records, and a good many roads fail to attempt the separation, not caring to go to the expense. The Norfolk & Western Railway, however, has always felt that for the intelligent guidance of its officers and as a matter of knowing the details of the results of its busi-

ness, where it could satisfactorily make the separation and was willing to incur the expense, and we have made this separation on the part of the railway company since its organization in October, 1896, and during the days of the Railroad Company the separation was similarly kept. I would say, however, that some years back the basis of the division of the expenses was somewhat different to what it is today, when the system of the basis of division was train miles, but as our line was extended and through West Virginia, largely a mountainous country where it was necessary in order to economize operation to have most of the freight trains "double-headers," that is two engines to the train instead of one, that we felt the engine mileage basis was more equitable, as charging the freight more equitably with its proper expense, the basis of engine miles being undoubtedly favorable to the passenger business, and realizing

64 that this passenger traffic was the weak part of our business, we have endeavored in every way to help it in our accounts.

Q. 42. What is the practice, if you know, of the Pennsylvania Railroad with respect to this separation?

A. The Pennsylvania Railroad, I only know in a general way, attempt the separation. I am under the impression they divide their General expenses on the basis of train miles. Their situation is different from ours and in working up a division of this kind it is necessary, in order to get fair and accurate results, to consider the peculiar circumstances on each road, and whilst on the Pennsylvania Railroad the train miles might be, and I have no doubt, is the best plan; on the Norfolk & Western Railway the situation with respect to grades and curves is different and in our endeavor to secure good results, largely using "double-headers" on freight traffic, I think that on the Norfolk & Western the engine mileage is undoubtedly preferable to the train mileage.

Q. 43. As I understand you, you first separate operating expenses into two classes, passenger and freight, according to the dividends of the road, and then divide the divisions into states, is that correct?

A. The first process is to determine how much of the expense is passenger and how much freight; the next is to distribute that passenger or freight over the various divisions, charging it to the exact division where used; or where the expense may be of a general nature, such as the salary of the President or officers, that is divided between the operating divisions on the basis of loaded and

65 empty cars, both passenger and freight.

Q. 44. Then what is the next division, if any, that you make?

A. That would give us the operating expenses, first, divided between passenger and freight, secondly, distributed to the expense account, and finally distributed to the operating division, so that we would then work up this sheet at the end of each month, commencing at Norfolk and going to Columbus, and showing all expenses of that division under these primary accounts.

Q. 45. What sheet do you refer to, Exhibit "A"?

A. Yes sir.

Q. 46. But suppose, Mr. Coxe, one of those divisions is partly in

one state and partly in another, then what division do you make, if any, and how?

A. That is sub-divided between the states through which that division runs, on the basis of mileage of track in each state.

Q. 47. How is that done, if you know?

A. The purpose being to get the expense of each state through which the road operates.

Q. 48. Why does that become necessary?

A. We keep our operating expenses by operating divisions, and we sub-divide the divisions by state lines, charging each state with its proper proportion on the basis of track mileage, and in that way we get the expenses in each state through which the road operates.

66 Q. 49. Are you or not required to return, for purposes of assessment or otherwise, these matters to assessing boards in the various states?

A. The earnings and expenses by states are required on our operating reports to the several state commissions, and also on our reports to the Boards of Assessment for taxation purposes.

Q. 50. State whether or not the Norfolk & Western Railway Company separates its passenger earnings from its freight earnings, and if so, by what method it is done?

A. The Norfolk & Western Railway Company separates its passenger earnings from its freight earnings. As far as the passenger business is concerned, these earnings are based upon the agents' monthly ticket reports, upon conductors' cash fare collections on trains, and from interline reports on tickets issued by other companies. Deducting the amounts due foreign companies by the Norfolk & Western on its interline ticket sales.

Q. 51. State whether or not after the gross earnings have been so ascertained, the same are divided into earnings intra-state and inter-state, and if so, by what method?

A. After we determine the gross earnings from the passenger business we proceed to analyze the passenger revenue as between intra and inter-state. This process being to take up the monthly ticket reports of agents, as well as the cash fare reports of conductors, inter-

67 line reports from other companies, and the Norfolk & Western proportion of its inter-line reports to other companies, and abstract the same on what we term Office Abstracts, showing every point from and every point to on the line of the Norfolk & Western Railway between which tickets are sold. Where a ticket originates and terminates in the state and does not pass out of it, it is classified as intra-state passenger traffic. Where it originates in one state and goes into another, then it is classified as inter-state traffic, and in this way we secure the intra-state gross passenger revenue for each state through which the road operates.

Q. 52. After the gross passenger receipts have been ascertained, intra-state and inter-state, how is the net revenue derivable from the one class of business and the other ascertained?

A. The first process is to deduct from the gross revenue the proportion of the expenses in the state chargeable to that revenue.

For the year ending June 30th 1907 the gross earnings being \$362,997.74 for intra-state passenger revenue, the ordinary operating expenses being 82.2 cents on the dollar, \$298,384.14, leaving net earnings for operations of \$64,213.60. From this is deducted the item of taxes, the total taxes in the state being \$258,745.96, this total amount is distributed to each class of business on the basis of gross earnings. The gross earnings from intra-state passenger revenue being \$362,997.74 and the entire gross earnings \$8,000,000.

68 082.56, the gross earnings from intra-state passenger revenue represents 4.49% of the total earnings in the state, and, therefore, we applied this 4.49% to the aggregate amount of taxes of the system in the state, \$258,745.96, which produces an amount of \$12,617.69, which is the proportion of the taxes for the year ending June 30th 1907 allotted to the intra-state passenger traffic in West Virginia. The net earnings from operation from intra-state passenger traffic is, therefore, the net earnings for operation, \$64,213.60, less the proportion of taxes, \$12,617.69, or a surplus applicable to Interest and Dividends of \$51,595.91.

Q. 53. And what per cent. return on the capital in West Virginia devoted to intra-state passenger service for the fiscal year ending June 30th 1907 would this make?

A. This surplus of \$51,595.91 would yield a return on the capital allotted to the intra-state passenger revenue, \$1,201,992.31, of 3.73%, this being the return leaving out of consideration any question of expenditures for additions and betterments charged against Income, and being for the year ending June 30th 1907.

Q. 54. Take the paper now handed you and tell us what it is. (Handing paper to witness.)

A. The statement just handed me is a summary of the freight and passenger traffic of the Norfolk & Western Railway system and the state of West Virginia, analyzing the traffic as between intra- and inter-state and for the year ending June 30th 1907.

69 Q. 55. Please explain that statement.

A. This statement is a general summary of the situation, first showing the gross earnings on the entire system as between passenger revenue, miscellaneous passenger earnings, total passenger earnings, freight revenue, miscellaneous freight earnings, total freight earnings and a grand total of passenger and freight earnings for the entire system of the Norfolk & Western. Following this is a statement of the entire traffic in the state of West Virginia showing the gross earnings from transportation of passengers, miscellaneous passenger earnings, and total passenger earnings, revenue from freight transportation, miscellaneous freight earnings, total freight earnings, and the grand total passenger and freight earnings in the state of West Virginia. Following this is a summary of the West Virginia intra-state traffic showing the revenue from transportation of intra-state passengers, miscellaneous passengers, intra-state, total intra-state passenger earnings, freight revenue intra-state, miscellaneous earnings, freight intra-state, total intra-state freight earnings and a grand total passenger and freight earnings intra-state for the state of West Virginia. Following this is a statement of the inter-

state traffic showing first the revenue for transportation of interstate passengers, miscellaneous earnings credited to interstate passenger earnings, and the total interstate passenger earnings; earnings from transportation of interstate freight, miscellaneous interstate freight earnings, and interstate freight earnings and the grand total of interstate passenger and freight earnings in West Virginia. Following this is a summary showing the ratio of per cent, and explaining the relationship of interstate passenger earnings to the total state earnings, mileage of the system and mileage in West Virginia. Also showing the passenger for the entire system and West Virginia, passengers-for-the-mile, West Virginia and passengers-one-mile, entire system, the statement being simply a summary of the general passenger and freight situation in the state.

Q. 56. From what has that statement been made up and by whom?

A. This statement is made up from the records and accounts of the Accounting Department of the Norfolk & Western Railway, and under my supervision.

Q. 57. You may state whether or not it is correct.

A. I think the statement may be considered correct, it being once susceptible of check and verification.

Q. 58. Please file it with and as a part of your deposition, marking it Exhibit "B. No. 1".

A. I herewith file summary of freight and passenger traffic of the Norfolk & Western Railway system and the state of West Virginia, analyzing the traffic as between intra- and interstate for the year ending June 30th 1907, to be known as Exhibit "B. No. 1".

Q. 59. Tell the paper any limited you will state what it is.

A. The statement just handed me is a summary of the West Virginia traffic showing passenger and freight interstate and intra-state, first showing the gross earnings on each class of traffic, the ordinary operating expenses, the net earnings from operations, deductions for taxes, and further expenses particularly related to us betweenstates, and finally the surplus applicable to between and betweenstates and the return which such surplus yields on that portion of the total capital of the state based upon the amount for taxation purposes which is allotted to each particular class of business, and finally showing the passengers and tons amounts for the interstate and intra-state, passengers intra- and interstate, freight and the total results for the entire business in the state.

Q. 60. For what year?

A. For the year ending June 30th 1907.

Q. 61. Tell us, please, from what that statement is made up and by whom?

A. This statement is made up under my immediate supervision from the summaries of the interstate and intra-state earnings which are, in turn, prepared from the tolls reports, available records, or when the operating expenses being taken from our records kept for that purpose, and our taxation and deductions for utilities and

betterments being similarly taken from our regular records in which such accounts are kept.

Q. 62. You may tell us whether or not that is a correct statement.

72 A. I will say that the statement is one which represents the true situation in the state of West Virginia.

Q. 63. Will you file it with your deposition and as a part thereof, marking the same Exhibit "B. No. 2".

A. I herewith file same, marking it Exhibit "B. No. 2".

Q. 64. I note, Mr. Coxe, that in the statement just filed and marked Exhibit "B. No. 2" there occur the following expressions "Rate of return including further expenses," and "Rate of return excluding further expenses". Please explain what is meant by these.

A. I would say that in drawing up the bill filed by the Norfolk & Western Railway Company, it was based upon returns which exclude any consideration of further expenses other than operating, or what is generally referred to as "Betterments". In accordance with the rulings of the Interstate Commerce Commission we have a class of operating expenses which cover purely the bare cost of operation as well as the current repairs to the property. In addition to these expenditures we have a further class of expenditures which while not strictly operating expenses are yet of such a character that they cannot or should not be capitalized, and if not capitalized must necessarily come out of the gross earnings. These expenditures referred to in the Exhibit as "Further Expenses" include such items as replacement of bridges, the abandonment of grade crossings, fencing, additions to stations, re-lining tunnels, tool equipment, automatic signals, and that proportion of double-tracking covering the feature of revision of lines and grades.

73 It will be noted from the foregoing that the general class of improvements mentioned are not such as would add actual additions to the physical property, but are more in keeping the road in thoroughly up-to-date shape, and adding to the safety of travel and meeting the increasing demands of the transportation public.

Q. 65. You may state whether or not the further expenses just described by you and called "Betterments" should in your judgment be deducted from gross earnings before ascertaining the net revenue?

A. There is little question in my mind as to the propriety of the deduction of these expenditures from the gross earnings before arriving at the amount which is applicable to Interest and Dividends. If they are not deducted from the gross earnings it would be necessary for the company to secure securities and the interest on such securities would have to be provided for. As a result, in the course of years the property invested would be top-heavy and the burden on the public would be increased.

Q. 66. You may state whether or not these Betterments or further expenditures, were deducted from the gross earnings derivable from intra-state passenger service in the state of West Virginia for the fiscal year ending June 30, 1907, for the purposes of ascertaining the net earnings of that branch of the service.

A. The expenditures for further expenses, or betterments,

74 was not deducted from the gross earnings on intra-state passenger revenue in the state of West Virginia for the year ending June 30th 1907, in arriving at the results applicable to the proportion of the capital allotted to intra-state passenger traffic.

Q. 67. Please tell us, if you know, what the result would have been had they been deducted?

A. The total expenditures for further expenses other than operating, or additions and betterments, in the state of West Virginia for the year ending June 30th 1907, was \$490,779.85. This total disbursement is allotted to the several classes of business on the basis of gross earnings the revenue from transportation of intra-state passengers being \$362,997.74, and the total earnings in the state from all sources being \$8,090,082.56, the gross revenue from transportation of intra-state passengers represented 4.49% of the entire earnings of the state. This percentage is, therefore, applied to the total expenditures to further expenditures on operations or betterments, \$490,779.85 yielding an amount of \$22,036.02, chargeable to the intra-state passenger traffic. With this deduction of the proportion of further expenses other than operating, the surplus applicable to Interest and Dividends on the transportation of Intra-state passengers would have been \$29,959.89, which applied to the portion of the capital allotted to the transportation of intra-state passengers \$1,391,902.31, produces return of 2.15%.

75 Q. 68. I likewise notice in Exhibit "B No. 2" a heading "Passenger figures used in drafting bill". Please explain what is meant in the statement by this.

A. On Exhibit "B. No. 2" for the year ending June 30th 1907, the item of gross earnings from transportation of intra-state passengers appearing in the Column "Passenger figures used in drafting bill" represents the revenue from transportation of intra-state passengers exclusively and does not include any of the miscellaneous passenger earnings in the way of mail, express, union news, and the numerous items of passenger train earnings. The figures on the statement to the right of this column "Passenger figures used in drafting the bill" include the miscellaneous passenger and freight earnings.

Q. 69. You may state whether or not if the passage by the Legislature of the state of West Virginia on the 20th day of February, 1907, of the act entitled "An Act Relating to and Regulating Passenger Rates upon Railroads in the State of West Virginia, and Prescribing Penalties for the Violation Thereof," which act was approved by the Governor on the 24th day of February, 1907, and went into effect on the 21st day of May, 1907, the Norfolk & Western Railway Company established in said state a two-cent passenger rate?

A. In accordance with the act of the Legislature the Norfolk & Western Railway introduced a two-cent intra-state passenger rate, effective May 21st 1907.

76 Q. 70. You may further state, if you know, how long it kept up that rate.

A. The two-cent passenger rate was kept in effect until September 15th 1909.

Q. 71. And what was the cause of the change at that date, if any change was made, and if you know?

A. Beginning with the 15th of September, 1909, the rate was increased to two and one-half cents, as I understand, resulting from a bill filed by the Norfolk & Western Railway asking that the rate be suspended.

Q. 72. Do you mean the bill filed in this present case?

A. The bill filed in this present case.

Q. 73. You may give us, if you know, the gross earnings of the Norfolk & Western Railway Company derived from the transportation of intra-state passengers within the state of West Virginia for the fiscal year ending June 30, 1908.

A. The gross earnings of the Norfolk & Western Railway from the transportation of intra-state passengers in the state of West Virginia for the year ending June 30th 1908, was \$289,943.22.

Q. 74. You may likewise give us, if you can, the expenses necessarily incident to the earning of that sum.

A. The ordinary operating expenses incident to earning the \$289,943.22 of intra-state passenger transportation was \$265,298.05.

77 The cost of earning a dollar of gross transportation revenue including taxes being 95 cents for the year ending June 30th 1908.

Q. 75. You may likewise state whether or not you ascertained this cost in the same way that you have described its ascertainment for the year ending June 30th 1907?

A. Precisely the same process was followed in the year ending June 30th 1908 in determining the cost to earn a dollar of intra-state passenger business as prevailed in the year ending June 30th 1907.

Q. 76. Then, it cost more to earn a dollar in that department in the year ending June 30th 1908 than it did during the year ending June 30th 1907, is that so?

A. That is the case. I would like to modify that a little bit. I think that expense should be 91.5 excluding taxes; it is 95 cents including the taxes.

Q. 77. Now, you may explain why, if you can, and if you know, this increased expense occurred.

A. This increased cost to earn a dollar is explained by the fact that in the year ending June 30th 1908 the earnings were reduced by the application of the two-cent passenger rate, whilst for the year ending June 30th 1907 the three-cent rate prevailed from July 1st 1906 to May 21st 1907, so that whilst the operating expenses might not have been any more, the cost to earn a dollar has increased by the fact that the gross earnings were considerably less than in the previous year, owing to the introduction of the 2-cent passenger rate which prevailed during the year 1908.

78 Q. 78. You may state, if you can, what the net earnings for the fiscal year ending June 30th 1908, derived from the transportation of intra-state passengers within the state of West Virginia,

were, that is to say, they constituted what per cent. per annum on the capital of the railroad invested in that state and allotted to intra-state passenger service?

A. The gross revenue from transportation of intra-state passengers for the year ending June 30th 1908, \$289,943.22, and the cost of earning this business was \$265,298.05, this latter amount leaving out of consideration any expenditures for additions and betterments, and being strictly the operating expenses. The net earnings resulting therefrom was \$24,645.17. Deducting from this net earnings, \$24,645.17 the proportion of taxes allotted to the intra-state passenger transportation, or \$10,221.74 leaves a net balance of \$14,423.43 applicable to Interest and Dividends. The proportion of the entire state capital allotted to the transportation of intra-state passenger business was \$1,391,902.21, and the rate of return on this capital excluding any consideration of further expenses or betterments is 1.04%.

Q. 79. That is for the fiscal year ending June 30th 1908?

A. For the fiscal year ending June 30th 1908.

Q. 80. You may state whether or not in ascertaining this per cent. showing the return, you applied the same methods that you

79 have described as having been applied in connection with the fiscal year of 1907?

A. In arriving at this return of 1.04% on the proportion of capital allotted to the intra-state passenger business during the year ending June 30th 1908 when the two-cent rate prevailed, it was exactly similar to the methods adopted in arriving at the returns for the year ending June 30th 1907 when the three-cent rate prevailed.

Q. 81. Tell us if you know whether or not the actual capital of the Norfolk & Western Railway Company in the state of West Virginia during the fiscal year ending June 30th 1908 and devoted to the transportation of intra-state passengers therein was greater or less in amount than the capital devoted by the said company in said state to the transportation of intra-state passengers during the fiscal year ending June 30th 1907.

A. It was certainly no less.

Q. 82. Take the paper now handed you and tell us what it is. (Handing paper to witness).

A. The statement just handed me is a summary of the freight and passenger traffic on the Norfolk & Western Railway system and for the state of West Virginia, analyzing the traffic between intra-state and inter-state for the year ending June 30th 1908.

Q. 83. How, by whom, and from what was that statement made up?

A. That statement is prepared from the books and records
80 of the company and under my general supervision.

Q. 84. You may state whether or not it correctly shows the situation that it purports to cover.

A. It is my belief it presents the correct situation of the passenger and freight traffic not only for the Norfolk & Western entire system, but for the situation in West Virginia.

Q. 85. Will you please file it with and as part of your deposition, marking the same Exhibit "C No. 1"?

A. I now file summary of freight and passenger traffic of the Norfolk & Western Railway system and for the state of West Virginia analyzing the traffic between intra-state and inter-state for the year ending June 30th 1908, and mark the same Exhibit "C No. 1".

Q. 86. Take the paper now handed you and tell us what it is. (Handing paper to witness).

A. The statement just handed me is a summary of West Virginia traffic showing passenger and freight intra-state and inter-state for the year ending June 30th 1908, displaying first the gross earnings, ordinary operating expenses, net earnings from operation, surplus applicable to Interest and Dividends, assessed values of properties for taxation, rate of return including further expenses or betterments, and rate of return excluding further expenses or betterments, showing these results both for the intra-state freight and passenger, and for the business generally in the state for the year ending June 30th 1908.

81 Q. 87. From what, how and by whom was that statement made up?

A. This statement was made up from the books and records of the Norfolk & Western Railroad Company kept in the Accounting Department and prepared under my supervision.

Q. 88. You may state whether or not it correctly shows the situation?

A. It is my belief that the statement shows the true situation of the intra-state passenger traffic and results on the capital allotted thereto in the state of West Virginia for the year ending June 30th 1908.

Q. 89. Will you file that statement with and as part of your deposition, marking same Exhibit "C No. 2"?

A. I herewith file the statement to be marked Exhibit "C No. 2".

Q. 90. Do you know what the assessment of the property of the Norfolk & Western Railway Company in the state of West Virginia was for the year 1908?

A. The assessment on the property of the Norfolk & Western Railway Company in the state of West Virginia for the year 1908 was \$31,000,000.00.

Q. 91. Tell us, if you know, how the capital of the Norfolk & Western Railway Company in the state of West Virginia and devoted to the transportation of intra-state passengers therein compared in the fiscal year of 1909 with the fiscal year 1908?

82 A. The capital allotted to the gross earnings of transportation of intra-state passengers for the year ending June 30th 1909 was \$1,391,902.21, being the same as in the year ending June 30th 1908.

Q. 92. What was the railway assessment in the state of West Virginia, if you know, for the year 1909, by the Board of Public Works of that state?

A. \$32,000,000.00.

Q. 93. Tell us, if you know, the amount of gross earnings derived

by the Norfolk & Western Railway Company from the transportation of intra-state passengers within the state of West Virginia for the fiscal year ending June 30, 1909?

A. The gross earnings from transportation of intra-state passengers in the state of West Virginia for the year ending June 30th 1909 was \$281,864.50.

Q. 94. I see it is stated in the bill that \$277,557.05 please explain that difference if you can.

A. As I now recall it, at the time the framing of that bill was considered we only had the earnings analyzed I think to March of that year, and we estimated the other three months. When the results of the year were finally ascertained and the exhibit now before me made up, we, of course, used the actual earnings for the year.

Q. 95. Tell us, if you know, what it cost per dollar to earn that sum of money.

A. The cost to earn a dollar intra-state passenger transportation for that year and not including therein the item of taxes was 97.06 cents.

Q. 96. What was it including taxation?

A. Including taxation, the cost to earn a dollar was 100.55 cents.

Q. 97. You may state whether or not you have arrived at these percentages by the same method as described by you with reference to the fiscal year ending June 30th, 1907.

A. Exactly the same method of procedure was adopted in arriving at the results for the year ending June 30th 1909 when the two-cent rate prevailed as was followed for the year ending June 30th 1907 when the three-cent rate prevailed from July 1st 1906 to May 21st 1907.

Q. 98. What percent, if you know, was the net earnings for the fiscal year ending June 30th 1909 derived from the transportation of intra-state passengers within the state of West Virginia of the capital of the plaintiff invested in said state, and allotted to such service?

A. The gross earnings of intra-state passengers transportation of the state of West Virginia for the year ending June 30th 1909 was \$281,864.50; deducting therefrom the ordinary operating expenses \$273,577.68, leaves as net earnings from operation \$8,286.62. The taxes in West Virginia for the year ending June 30th 1909 were in total \$271,045.17. This amount being allotted to the several classes of business on the basis of gross earnings, and as the intra-state passenger transportation earnings form 3.63% of the entire earnings in the state, this percentage was applied to the total taxes paid, or \$271,045.17, yielding an amount chargeable to the intra-state passenger transportation earnings of \$9,838.94, leaving a deficit of \$1,522.12, so that there was no return accruing on the capital allotted to the intra-state passenger transportation, \$1,391.902 21.

Q. 99. Have you statements covering the fiscal year ending June 30th 1909 similar to those you have filed for the fiscal years ending respectively June 30th 1907, and June 30th 1908?

A. I have.

Q. 100. Take the paper now handed you and tell us what it is.

A. The paper now handed me is a summary of freight and passenger traffic for the Norfolk & Western Railway system and state of West Virginia analyzing the traffic as between intra-state and inter-state for the year ending June 30th 1909.

Q. 101. From what, by whom, and how was same made up?

A. This statement was made up from the records and accounts in the Accounting Department of the Norfolk & Western Railway Company, and under my general supervision.

Q. 102. State whether or not it correctly shows the situation of which it treats.

A. I believe it is a true presentation of the accounts of this particular business applying not only to the Norfolk & Western system, but to the state of West Va.

85 Q. 103. Please file same with and as part of your deposition and mark same Exhibit "D No. 1."

A. I herewith file said statement or summary of freight and passenger traffic and mark the same Exhibit "D No. 1," and showing results for the year ending June 30th 1909.

Q. 104. Take the paper now handed you and tell us what it is.

A. The statement just handed me is a summary of West Virginia traffic showing passengers and freight intra-state and inter-state for the year ending June 30th 1909, showing first the gross earnings on both classes of traffic, freight and passengers intra-state and inter-state, the ordinary operating expenses, net earnings from operation, deductions for taxes and further expenses other than operating, surplus applicable to Dividends, assessed value of the property for taxation, and division of same between the several classes of business above referred to.

Q. 105. From what, by whom, and how was that statement made up?

A. This statement was made up from the records and accounts kept in the Accounting Department of the Norfolk & Western Railway, and under my supervision.

Q. 106. You may tell us whether or not it correctly shows the situation with respect to which it purports to speak.

86 A. My belief is it is a correct presentation of the situation in West Virginia pertaining to the transportation of intra-state passenger traffic.

Q. 104. Please file this statement with and as part of your deposition and mark same Exhibit "D No. 2."

A. I herewith file summary of West Virginia traffic showing passenger and freight intra-state and inter-state for the year ending June 30th 1909, and mark the same Exhibit "D No. 2."

Q. 105. You may state what effect, if you know, the imposition of the two-cent passenger rate in the state of West Virginia has had upon the revenues of the Norfolk & Western Railway Company derivable from that service in that state, as compared with the year 1907 when the three-cent rate was in force.

A. For the year ending June 30th 1907 the intra-state passengers

were 815,506, the equivalent intra-state passenger-one-mile was 13,025,247, and the revenue earned thereon was \$362,997.74, yielding an average rate per passenger per mile of 2.79 cents, this being in the year when the three-cent rate prevailed up to May 21st 1907. During the year ending June 30th 1908 the intra-state passengers were 965,223, the equivalent passenger-one-mile intra-state 14,995,214, and the gross transportation revenue earned thereon was \$289,943.22, or an average rate of passenger per mile of 1.93 cents, the two-cent intra-state passenger rate being in effect during this entire year. The intra-state passenger revenue for the year ending June 30th 1907 being \$362,997.74 and for the year ending June 30th 1908 the intra-state gross passenger revenue being \$289,943.22 indicated a loss as compared with 1906-1907 on this intra-state passenger transportation of \$73,054.52. This, in spite of the fact that passengers-one-mile had increased 1,969,967. For the year ending June 30th 1909, the gross transportation revenue from intra-state passenger revenue within West Virginia was \$281,864.50, as compared with the year ending June 30th 1907, when the three-cent rate prevailed of \$362,997.74, and as compared with the year ending June 30th 1908 when the two-cent rate prevailed of \$289,943.22, the results for the year ending June 30th 1909 showing a loss as compared with the year ending June 30th 1908 of \$8,078.72, and compared with the year ending June 30th 1907 when the three-cent rate prevailed, a loss of \$81,133.24 on the intra-state passenger transportation within West Virginia. The passengers-one-mile for the year ending June 30th 1909 were 14,592,621, as compared with the year ending June 30th 1907 of 13,025,247, the intra-state passenger business summarizing for the year ending June 30th:

	Passengers.	Passengers-one-mile.	Return.
1907	815,506	13,025,247	\$362,997.74
1908	965,223	14,995,214	289,943.22
1909	1,067,991	14,592,621	281,864.50

88 Q. 106. Mr. Cox, how much, if you know, does the Norfolk & Western Railway Company earn within the state of West Virginia per mile of track for passenger services rendered?

A. For the year ending June 30th 1907, the passenger revenue per mile of road in West Virginia was \$1,889.00. In 1908 when the two-cent rate prevailed it was \$1,554.00 per mile, and in 1909 when the two-cent rate prevailed it was \$1,376.00.

Q. 107. You may state whether or not this includes both inter-state and intra-state services?

A. That is the entire revenue per mile in West Va.

Q. 108. What is it per mile upon the rest of the system outside of West Virginia?

A. The passenger revenue per mile in 1907 was \$2,340, in 1908 \$2,228.00, in 1909 \$2,028.00; the excess of the Norfolk & Western system outside of West Virginia over that of West Virginia was,

therefore, in 1907, \$451.00 per mile, in 1908 it was \$674.00 per mile, and in 1909 \$652.00 per mile.

Q. 109. What is the rate chargeable for passenger service in the state of Virginia?

A. Two and one-half cents.

Q. 110. What in the state of Ohio?

A. Two cents in the state of Ohio.

Q. 111. What in North Carolina?

A. Two and one-half cents.

89 Q. 112. What is it in Maryland?

A. Three cents.

Q. 113. You may state whether or not it was at any time in the state of Virginia less than two and one-half cents, and if so, what the history of that situation was.

A. In the state of Virginia prior to October 1st, 1907, the rate was three cents. In accordance with an order of the Corporation Commission it was reduced to two cents, which became effective October 1st, 1907. That rate continued until May 3rd, 1909. In the meantime the railway company had entered into litigation with the state, and while the litigation was not completed the Corporation Commission consented to give us a rehearing of the case, and as a result of that, the two and one-half rate became effective on May 3rd, 1909, and has continued from that time on.

Q. 114. What was the experience of the road, if you know, in this respect in the state of North Carolina?

A. The state of North Carolina, my recollection was they first made the rate two and one-quarter cents; litigation followed and the Legislature compromised by making the rate two and one-half cents.

Q. 115. What is the character of the *company* with respect to its population, whether dense or sparse in the counties of West Virginia through which the Norfolk & Western Railroad runs?

90 A. The County of Jefferson on the line of the Shenandoah

Valley railroad is an agricultural country and it might be termed as rather sparsely populated, there being no towns of any importance on it, Shepherdstown being at the northern terminus on the Potomac River, which has never perceptibly grown; Charlestown has improved a little, but as a general proposition I would say the population there was rather light. Coming further on the line into Mercer and McDowell, we have the town of Bluefield, Mercer County, with a population of probably 15,000, and passing into McDowell County while it has a lack of prosperity along the line of the railway on account of the numerous coke ovens and coal mines, the population is simply on the surface and along the line of the railway and does not extend back into the county; and, going westward after you pass Welch, which is a small town, no settlement of any importance is passed until Williamson is reached with about 5,000 population. Beyond there on the Old Line via Dingess and Dunlow and on the New Low Grade Line, Naugatuck, Fort Gay and Kenova. Through Mingo and Wayne Counties the country is very thinly settled.

Q. 116. You may state, if you know, whether or not the business

of the Norfolk & Western Railway Company during your connection with that road and its operation has been economically managed?

A. I have little hesitancy in stating that on my entire experience with the Norfolk & Western Railway and prior to that with the Railroad Company, that it has always been handled intelligently and economically. It is true in 1896 the road was re-organized but that was not as a result of any bad management or lack of intelligence. The road had been developed ahead of the country and the revenues were not sufficient to pay interest on bonds.

Q. 117. What would you say with respect to the character of its management and the operation of its business from the beginning of the fiscal year 1907 to the present time?

A. I should say that the same standard which prevailed prior to that time has continued, the road being handled with intelligence and economy.

Q. 118. When was the Norfolk & Western Railway Company organized?

A. The Norfolk & Western Railway Company was organized on October 1st, 1896.

Q. 119. You may state whether or not it has paid dividends during its entire history?

A. The preferred stock received no dividends until 1898, and since that time has paid regularly four percent.

Q. 120. What about the common stock?

A. The common stock, which represents about 75% of the entire stock, received no dividend until 1901, when one per cent. was paid; in 1902, two percent.; in 1903, 1904, and 1905, three percent.; in 1906, four percent.; in 1907, five percent.; 1908, four and one-half percent.; 1909, four percent., and in 1910, five percent.

Q. 121. Can you state the average dividends received by the common stockholders from the organization of the company in 1896 down to June 30th, 1910?

A. The average for the 13 $\frac{3}{4}$ years ending June 30th, 1910, would represent 2.51% dividend on the common stock.

Q. 122. What percent. of the entire stock does the preferred represent?

A. In round numbers about 25%.

Q. 123. Can you tell us what amounts have been actually expended for Betterments from the date of the organization of the Norfolk & Western Railway in 1896 to the year ending June 30th 1910?

A. Over \$23,000,000.00.

Q. 124. You may state whether or not this was paid out of income?

A. That was entirely paid out of income.

Q. 125. What is the dividend provided for preferred stock?

A. Preferred stock which took the place of some of the bonds of the old company, being given in exchange for bonds at the time of reorganization of the old company, is limited to four percent.

Q. 126. Suppose, now, Mr. Cox, the preferred stock had received four percent. dividends from the time of the organization of the

road in 1896 down to the end of the year, June 30th, 1910, and the common stockholders had received dividends to the amount of five percent. per annum what would those dividends, if you
93 know, have amounted to?

A. Had the preferred stockholders received a uniform dividend of four percent. from the time of the organization of the Norfolk & Western Railway to June 30th, 1910, it would have represented an amount of \$12,585,021.83, and had the common stockholders received a uniform rate of dividend of five percent. per annum from the time of the organization of the Norfolk & Western Railway Company October 1st, 1896, to June 30th, 1910, it would have represented an amount of \$44,386,608.28, the total of the two dividends, the preferred \$12,585,021.83, and the common, \$44,386,608.28, represents a total of \$56,971,630.11.

Q. 127. What did these stockholders really receive during that period?

A. The preferred and common stockholders actually received in this period, October 1st, 1896, to June 30th, 1910, an average dividend of 2.85%, or \$34,218,714.50.

Q. 128. What then would you say was the difference between what they could reasonably have expected over what they actually received in dividends?

A. The excess of what they could have reasonably expected on the basis of preferred stock receiving four percent., and the common stockholder five percent., over what they actually did receive in dividends during the period to June 30th, 1910, was \$22,752,915.61.

Q. 129. And the amount actually expended for Betterments during that period was what?

A. Something over \$23,000,000.00.

94 Q. 130. Mr. Coxe, in the second paragraph of the bill filed in this case it is charged that the average rate per passenger per mile received by this company from its intrastate passengers in the state of West Virginia approximated the sum of 2.94 cents per mile. In paragraph Two of the answer filed by the defendants it is denied that the average rate of fare per passenger per mile during the year ending June 30th, 1907, approximated 2.94 cents, but on the contrary it is averred that said rate of fare was only 2.364 cents, as shown by the report of the Norfolk & Western Railway Company to the Board of Public Works of West Virginia. Now, will you please state specifically the facts with reference to these allegations, with such explanations in connection therewith as may appear to you to be proper?

A. After the West Virginia Legislature had passed the law introducing the rate of two cents per mile on intra-state passenger business in West Virginia and when our management was desirous of knowing what the result of the rate might be, certain statements were made up, and to the close of March, 1908, the average rate was 2.94 cents, the intra-state rate at this time being three cents per mile. In the meantime, the two-cent rate became effective and at the end of June, as a result of said two-cent rate being introduced, the average rate per passenger per mile for the year ending June

30th 1907 had dropped to 2.79. At the time of drawing up our bill, this statement to the end of March was no doubt before us
95 and the figures were used in error. The answer of the state of West Virginia, however, is in error in stating that the rate was only 2.364, this latter rate being the average rate per passenger per mile on the Norfolk & Western system for the year ending June 30th 1907, and not the average per passenger per mile in the state of West Virginia.

Q. 131. Also in Paragraph Two of the answer of the defendants it is charged that the Railway Company shows by its report for the year 1907 to the Board of Public Works for the State of West Virginia that its earnings on the capital invested in West Virginia in its passenger traffic during said year were largely in excess of six per cent. per annum after the payment of all taxes and other expenses and the expenditure of large sums for maintenance of equipment and improvements. Will you please refer to that report, analyze and discuss same with reference to the charge just recited?

A. For the year ending June 30th 1907 the rate of return on the capital allotted to the transportation of intra-state passengers was 3.73% excluding from the calculation any allowance for expenditure for additions and betterments. If such expenditures are included and deducted from the net returns, then the rate of return on the capital allotted to the transportation of intra-state passengers for the year ending June 30th 1907, would be 2.15. The difference
96 between this rate and that claimed by the State of West Virginia is explained I believe by the state of West Virginia in its calculations assuming that the cost to earn a dollar of gross earnings was the same on all classes of business. This, of course, we dispute claiming that the cost to earn a dollar of passenger business is vastly in excess of the cost of earning a dollar of all business.

Q. 132. Towards the conclusion of the second paragraph of the answer of the defendants it is claimed that the passenger traffic earnings in the state of West Virginia for the year of 1907 was sufficient to pay about 19% per annum on the \$1,391,902.21, which is the capital allotted to intra-state passenger business in West Virginia and that for the subsequent years ending June 30th 1908 and June 30th 1909 said earnings would be sufficient to pay slightly less than 19% per annum. Please explain said reports with reference to this charge that the company earned during these three years about 19% upon the capital allotted to its intra-state West Virginia passenger business and find, if you can, how the error in this charge, if error there be, was apparently made so far as you can understand the claims.

A. From my understanding of the matter, I feel that the statement is in error as to the capital allotted to the intra-state passenger business in West Virginia earning 19%, and that the error is based upon, first, the erroneous assumption that the cost to earn a dollar
97 of all classes of business is the same; this, we, of course, dispute, claiming that there is a vast difference in the cost of earning a dollar of intra-state, inter-state or all passenger

business in West Virginia, as compared with all freight business. Secondly, I am inclined to believe that the erroneous statement has been made from the fact that the state has in all probability taken the gross earnings on our passenger business in West Virginia and applied it to the capital allotted to the transportation of intra-state passengers only; whereas, if the entire passenger earnings of the state are to be considered it should be applied, of course, to the capital appropriated to both intra-state and inter-state passenger traffic.

Q. 133. Why does it seem to you that the error has been made in the answer of the defendants of applying all earnings from both inter-state and intra-state passenger business as a return upon the capital allotted simply to the intra-state passenger business?

A. Simply from the fact that applying the results of the entire passenger business to the capital allotted to the intra-state passenger business would yield a little over 19%.

Q. 134. In the third clause of the fifth paragraph of the defendant's answer it is charged that the statement in the bill that the gross earnings from intra-state passenger business of West Virginia for the year ending June 30th 1908 was in excess of the sum of \$289,943.22 as alleged in the bill and it is also stated that the cost

of earning said passenger business was not approximately 98 95% thereof, and that the net earnings derived by the company from its intra-state West Virginia passenger business after the payment of taxes and all expenses and charges connected therewith was largely in excess of 6% per annum on the capital allotted to that purpose. Now, I ask you to state the facts in connection with these several propositions as alleged.

A. My recollection of this particular matter is that on our original figuring we only had the results for nine months for the year ending June 30th 1908, and I am under the impression that our bill states that the balance of the year is estimated. When we finally wound up results for the year ending June 30th 1908 we confirmed the actual figures in our exhibits and also in making our report to the Board of Public Works for taxes. My recollection is we reported to the Board actual earnings for the year. I would, therefore, state in conclusion that the gross earnings in transportation of intra-state passengers for the year ending June 30th 1908 and not including any miscellaneous earnings in the way of mail, express, baggage, storage, et cetera, was \$249,943.22, the earnings accruing to the capital allotted to the transportation of intra-state passengers for the year ending June 30th 1908 and excluding from the calculations an allowance for betterments, was 100%. I presume the statement is made by the state of West Virginia to the effect that the earnings

were considerably over six per cent, was based on the erroneous assumption that the cost of earning a dollar of intra-state passenger transportation was the same as earning a dollar of all classes of business in the state of West Virginia for the year ending June 30th 1908. This, of course, we dispute, claiming that the cost to earn a dollar of intra-state passenger revenue is vastly in

gross of the average cost of carrying a dollar of all classes of business in the state.

Q. 130. Do those matters all as you have explained appear in the exhibits that you have heretofore filed with your Department?

A. Yes sir.

Q. 131. In Paragraph 11 of the report of the Department there are statements made purporting to be based upon the annual reports of this company made to the Board of Public Works of the state of West Virginia to the effect that on the entire business of the company in West Virginia, including its insurance and insurance freight and passenger business, there are added for the years ending June 30th 1907, 1908 and 1909, a sum of one, eight or nine percent on the value of the property of the company assessed by it for taxation in West Virginia, and some six or seven percent on the value of the property of the company in West Virginia as assessed by the Board of Public Works. Please give another the percentages mentioned are substantially correct or not, together with any objections that you may have to offer to the accuracy of

100 calculations which is adopted in the report of the Department.

A. As far as I could see in reading over the report and endeavoring to verify the calculations, they seemed to have been correctly made, but they did not seem to me to have any bearing on the case for the reason that I have since reflected that in those hearings, the matter was confined to that class of business concerning which the issue was in question. I think if I saw the proper documents to go into it all, and take the entire business situation of the company in the state, then there should undoubtedly be allowed out of the gross earnings the amount necessary to pay for the additions and betterments, or as we term them, further expenses other than operating. This amount must be provided for in some way, or be paid out, and must either come out of the gross earnings, or if not allowed to be taken out in total, then should be some allowance made of the second expenditures for additions and betterments to line, and interest allowed thereon. If as I feel is the correct thing, these expenditures for additions and betterment should be provided for out of the gross earnings and if such allowance is made the rate on the entire capital situated in the state of West Virginia will not be eight or nine per cent., but for the year 1907, the return on the capital of \$21,000,000 it would be 7.12%, and for the year 1908 the gross result is the same on the entire capital invested in the state would be 7.7%. That is the 100 second value, and for the year 1909 the return on the entire capital of \$22,000,000,000 would be 7.12%, this return including all business insurance and insurance freight and freight allowable to the state of West Virginia.

Q. 132. Does that figure as yet reflect a substantial percentage earnings in the state of West Virginia?

A. I should say not.

Q. 133. It is likewise charged in the report of the Department that the Bureau in the revenue of the Northern & Western Railway

Company for the year ending June 30th 1908, was caused by the general depression of business throughout the country and not the enforcement of the two-cent passenger law. Will you please state whether or not this allegation is true?

A. For the year ending June 30th 1907, the intra-state passenger business in West Virginia was 815,506 passengers, 13,025,247 passengers-one-mile, with gross earnings \$362,997.74; for the year ending June 30th 1908, the number of intra-state passengers was 965,223, or an increase of 149,717 passengers, the passengers-one-mile for the year ending June 30th 1908 were 14,995,214, or an increase over 1907 of 1,969,967; the gross earnings for the year ending June 30th 1908 were \$289,943.22; so that whilst the company transported in the year ending June 30th 1908 1,969,967 passengers-one-mile more than in the year ending June 30th 1907, it received therefor \$73,054.52 less than it received in the year ending June 30th 1907. This decrease, whilst partly owing to the decrease in rate, is probably partly attributable to the severe depression in business which we all know existed, beginning in November, 1907.

By Mr. COCKE:

Q. 140. You referred a moment ago to the decrease in the business, does that apply to the intra-state passenger business, the figures of which you have just given, or is the decrease in revenue resulting from that business solely due to the decrease in the rate which was charged?

A. As far as the intra-state passenger business is concerned, the decrease may be attributed entirely to the reduction of the rate from three cents to two cents.

Cross-examination.

By Hon. W. G. CONLEY:

Q. 1. Mr. Cox, does the Norfolk & Western Railway Company issue and sell mileage books over the system?

A. Yes sir.

Q. 2. Good in the state of West Virginia?

A. Yes sir.

Q. 3. At what rate per mile does it sell those mileage books?

A. Two cents per mile.

103 Q. 4. Are the interchangeable mileage books sold by other railroad companies good over the line of the Norfolk & Western in West Virginia?

A. No, sir.

Q. 5. I believe you stated on direct examination that the gross earnings from passengers in West Virginia for the year 1907 were \$362,997.74, was that from passenger fares alone?

A. That was from the transportation of intra-state passengers exclusively.

Q. 6. Then no amount for the revenue to your company from inter-state passengers going from another state into West Virginia

and also going from West Virginia into another state were included in this amount?

A. No sir; that is the amount of intra-state passengers exclusively?

Q. 7. It did not include any revenue from other passenger services, such as expressage, excess baggage, et cetera.

A. It did not.

Q. 8. In the statements you have filed as part of your deposition, are any sources of passenger revenue included other than intra-state revenue?

A. In the answer we made in our bill we confined ourselves to the gross revenue from transportation of intra-state passengers. In the exhibits filed today, however, we also showed the earnings in the intra-state passenger traffic in West Virginia, not only on the passengers transported, but on the proportion of mail and express credited to this. In other words, the exhibits showed two sets of figures, one for the figures in the bill and the other the entire display of the business in West Virginia.

Q. 9. Do the exhibits also include that portion of passengers passing entirely through West Virginia, for which proper allowance should be made to the credit of the state of West Virginia?

A. In the Inter-state gross passenger earnings we include not only the passengers originating in the state and going out, those originating out and coming in, but also those originating beyond and terminating beyond, but passing through the state.

Q. 10. Will you explain more fully how that is set out in the exhibits filed as part of your deposition?

A. In the figures used in the bill we applied, or rather used, the revenue from the transportation of intra-state passengers. We show, however on the exhibit the entire intra-state earnings, which not only include the transportation of passengers, but also the earnings from mail, express and other sundry items, which are properly creditable to the intra-state passenger earnings. Similarly in the inter-state out exhibit shows not only the revenue from the transportation of intra-state passengers, but also and in addition thereto

the earnings from mail, express, union news, et cetera, which are credited to inter-state passenger earnings. These two credits are the accounts accruing from the transportation of mail, express, extra baggage, news privilege, passenger trains furnished the state of West Virginia, automatic weighing machine returns, and miscellaneous collections by our treasurer, which are divisible between inter-state and intra-state on the basis of gross earnings. In other words, we consider that mail, express and news and extra baggage follows the main business of transportation of passengers.

Q. 11. In the bill of complaint in this case you allotted the passenger service in West Virginia for the year ending June 30th 1907, \$1,391,902.31. How did you arrive at that allotment?

A. That was arrived at by taking the entire assessed value of the property in the state of West Virginia at \$31,000,051.45, that amount was allotted to the various classes of business in the proportion of gross earnings. In other words, the gross earnings from

transportation of intra-state passengers for the year ending June 30th 1907 was \$362,997.74, this amount representing the transportation of passengers exclusively, and not including mail, express, etc. This \$362,997.74 represents 4.49% of the entire gross earnings of the state, \$8,090,082.56. This percentage of 4.49 is accordingly applied to the entire capital in the state, of \$31,000,051.45, producing the capital allotted to the transportation of intra-state passengers, or \$1,391,902.31.

106 Q. 12. You stated on direct examination that the cost per dollar to earn the intra-state passenger revenue was slightly over 85½ cents on the dollar, including taxes; and excluding taxes slightly over 82 cents on the dollar. What amount of the entire expenses did you charge to the passenger department in arriving at this conclusion?

A. The entire expenses in the state of West Virginia for the year ending June 30th 1907 of all kinds was \$5,403,767.10, of which \$4,587,238.34 was freight expenses and \$816,528.76 was passenger expenses. These passenger expenses represented a cost of 82.02 cents on the dollar to earn \$993,314.17, and in order to get the expenses on the transportation of intra-state passengers exclusively we assumed that the cost was the same as the cost of earning the entire passenger business in the state. In other words, we did not intend to differentiate between the cost of intra-state and inter-state passenger business.

Q. 13. Do you divide or keep separate the freight expense from the passenger expense?

A. Under our system of accounting we endeavor to separate all expenses as between passenger and freight.

Q. 14. Are part of those expenses what are generally known as common expenses?

A. Some are common expenses, especially maintenance of way, which cannot be distinctly located to either passenger or freight.

Q. 15. For the purposes of this suit on what basis did you
107 divide common expenses?

A. As illustrated in the Maintenance of Way, we have some few items which can be located, such as improvements on buildings and grounds. Outside of that we divide the expenses between passenger and freight on the basis of engine mileage.

Q. 16. Why do you not make it up on the basis of car mileage?

A. We feel that the engine mileage, being you might say, the unit of earnings and expenses, is more appropriate than the separation on the basis of car miles.

Q. 17. Isn't the cost of operating a freight engine when in use greater per engine than the cost of operating a passenger engine?

A. The absolute cost of moving the engine might be more, but the results attained would probably be radically different in the revenue.

Q. 18. Isn't it, as a matter of fact, considerably greater as shown by your records kept of your repair shops, and the cost of coal, etc.?

A. The freight engine, as a rule, is of larger capacity and probably consumes a little more coal, and in fact all of the supplies.

Q. 19. And isn't it also a fact, Mr. Cox, that in the operating part of your railroad through West Virginia that it is very seldom you use what is termed double-headers for passenger trains?

108 A. We have a few, but I think they might be called exceptions.

Q. 20. And isn't it true also that you nearly always use what is known as "double-headers" for freight trains in going up your grades in West Virginia?

A. I presume that the big percentage of our freight traffic is hauled by "double-headers."

Q. 21. Then, does not the engine mileage which you have adopted operate unfairly against the Passenger Department in arriving at some of the figures used in your Exhibits?

A. I should say that as a general proposition the engine mileage was decidedly in favor of the passenger business, and not the freight, in reducing the proportion of general items which may be charged to passenger expenses.

MEMO.—Since making answer to Question 21, an investigation of the comparative percents based on mileage of passenger and freight engines and percents based on mileage of passenger and freight trains demonstrates the fact that the division of undistributed items of expense: i. e., such items as cannot be directly located to passenger or freight on the basis of engine miles, passenger and freight, charges a decidedly less proportion of these undistributed expenses to passenger service than a division on basis of train miles:

Thus in my Exhibit B-2 for 1907 and corresponding exhibits for 1908 and 1909, any items of expense which could not be
109 located to passenger or freight I divided on basis of engine miles, charging to passenger expenses in this way 20% of such general items.

Had I used Train miles as basis of division of General items of expenses, the proportion chargeable to passenger would have been in 1907, 29%, and in 1908 the percentage chargeable to passenger would have been 31%, and in 1909 the percentage chargeable to passenger would have been 31%.

Q. 22. I am speaking specifically as applied to the conditions in West Virginia and the questions involved in this litigation.

A. In West Virginia the probabilities are that the percentage is little different from what it would be on the entire system, because in West Virginia we do have a great many freight trains and they are all double-headers, and the passenger trains, as a rule, are single engine trains, although we do have from time to time double-header passenger trains.

Q. 23. Some of your freight trains have more than two engines?

A. I think not; I am not prepared to say, but I think there is one occasionally.

110 Q. 24. Isn't it a fact, Mr. Cox, that the Norfolk & Western Railway Company and especially that part of it as constructed through West Virginia was constructed, and has been for some time, and is now operated mainly as a freight carrying road,

and that the passenger business is only incidental to the objects of the construction of this road?

A. The freight business, no doubt, is the great bulk of the business, but I would hardly say the passenger business is incidental, because our line through West Virginia is comparatively important. We carry mail and express for the accommodation of the public; our train service is comparatively frequent, and, while the freight business is the great money-making business of it, the passenger business is still an important feature. We have to maintain schedules as long as we run passenger trains, whether anybody rides or not; we can't cut off a train because there is no travel, and taking it all in all, while the results of the passenger business are smaller as compared with freight, it is still in itself an important business.

Q. 25. Will you make up and file a statement as a part of your deposition showing the number of freight engines used, the number of miles made in the aggregate and the cost of operating same in West Virginia, for each year ending June 30th 1907, 1908, 1909 and 1910, and also a separate statement showing the same as to the passenger engines?

111 A. Yes sir.

Q. 26. And will you show on the statement the basis on which the figures are made up?

A. Yes sir, and will mark it Exhibit "J. W. C. No. 1."

Q. 27. Is not the cost of repairs to freight engines per engine much more than the cost of repairs to passenger engines?

A. That is a pretty difficult question to answer. The passenger engine, of course, has got to be kept right up to the top notch, and more frequently repaired than the freight engine. Individual parts or repairs to freight engines might be heavier, but I very seriously question the average repairs put on a freight engine in the course of a year would be any more than a first-class passenger engine, which has to be kept up to the top notch.

Q. 28. Do the items going to make up the item in Exhibit "B. No. 2" termed "Rate of Return Excluding Further Expenses" include Betterments?

A. The rate of return excluding "further expenses" does not include Betterments. I would say that the further expenses and betterments are synonyms—they mean the same thing.

Q. 29. What items are included in the word "Betterments" as used in these statements?

A. It is a class of expenses that whilst not strictly within the limit of operating expenses as prescribed by the Interstate Commerce Commission, is a class of expenses which we feel for the financial soundness of our company should not be capitalized, but should be paid for out of the gross earnings.

112 Q. 30. I notice in the last line at the left of Exhibit "B. No. 2" this statement: "Average Rate per p. o. m. and t. o. m." Will you explain the meaning of that?

A. Rates p. o. m. refer to passengers-one-mile, and t. o. m. refer to tons-one-mile.

Q. 31. In the first column of Exhibit "B No. 2" filed with your

deposition in chief you give the value of bonds and stocks at \$1,952,680.00 allotted as capital employed in earning the intra-state passenger revenue. Will you explain on what basis that valuation is made, whether it is book value, par value, or the market value?

A. The amount \$43,489,533 which appears as the total bond and stock valuation at the extreme right hand of Exhibit "B No. 2" is arrived at by taking the entire issue of capital stock at its par value, \$89,000,000.00, less the amount held in the treasury, \$1,539,700, or \$87,460,300 of capital stock. Total bonds in hands of the public, \$87,852,500 and equipment trust obligations of \$11,900,000, making a total of \$187,212,800, which is amount of capital obligations in hands of public. This is divided on the basis of track mileage, West Virginia mileage being 432.66, mileage of the system 1,862.71; West Virginia percentage 23.23, which applied to the total of \$187,212,800 produces the amount of \$43,489,533, which is the total of the bond and stock valuation as applied to West Virginia. That is subdivided between the various classes of business on plans similar to that adopted with the distribution of the assessed value, that is, on the basis of gross earnings, the 113 intra-state gross transportation earnings being 4.49% of the total earnings of the state are applied to the \$43,489,533 to produce the bond and stock valuation of \$1,952,680 employed in earning \$362,997.74 gross intra-state passenger revenue.

Q. 32. What was the par value of the outstanding common stock issued of the Norfolk & Western Railway Company as of June 30th 1910?

A. The par value of the common stock outstanding June 30th 1910, was \$68,896,000.00.

Q. 33. What was the market value of the common stock on the 30th day of June 1910?

A. The Commercial & Financial Chronicle issue of July 2nd 1910, shows the common stock ranging from 96 to 98 on the 30th day of June, 1910.

Q. 34. What is the par value of the total amount of outstanding preferred stock as of June 30th 1910?

A. The par value of the entire amount of outstanding preferred stock is \$23,000,000.00.

Q. 35. What was the market value as of that date?

A. 87½ bid.

Q. 36. Do any of your bonds sell for less than par?

A. Yes sir.

Q. 37. What class of bonds and what amount sold for less than par, or were valued at less than par, June 30th 1910, and how much below par was that valuation?

A. Reference to the Commercial & Financial Chronicle of issue July 2nd 1910, page 26, shows the sale of the following bonds of the Norfolk and Western Railway Company issue below par:

114 (1) 10-25 Year Convertible 4% Bonds..... 99¼

These bonds are convertible on and after June 1st 1907, but prior to June 1st 1917, at option of holder, into paid-up shares of the same par value of the Common Stock of the Company.

(2) Other issues were quoted below par with no sales: First Consolidated Mortgage 4% Bonds—Bid 98; These bonds are a first lien on about 898 miles of railroad:

Norfolk Terminal Division.....	6.30 miles
Clinch Valley Division.....	123.37 miles
Lynchburg & Durham Division.....	117.58 miles
Roanoke and Southern Division.....	121.50 miles
Maryland and Washington Division.....	244.16 miles
Ohio Extension.....	256.37 miles
North Carolina Extensions.....	28.30 miles

and subject to previous mortgages are a lien upon 776 miles of additional railroad:

(3) Divisional First Lien & General Mortgage 4% bonds, Bid 90¼; These bonds are a first lien on Cincinnati Division, Portsmouth, O., to Idlewild, O., aggregating...	131.69 miles
Big Sandy Low Grade Line, Naugatuck to Kenova..	59.15 miles
Dry Fork Branch.....	29.43 miles

and upon such equipment, extensions and branches as may be acquired or constructed out of proceeds of the new bonds; subject to First Consolidated Mortgage they are a lien upon the properties covered by the latter.

115 (4) Scioto Valley & New England R. R. Co. First Mortgage 4% Gold Bonds, Bid 94.

These bonds are a first lien upon 128.6 miles of road extending from Columbus, O., to Coal Grove, O. We have no means of determining the total sales of Bonds June 30th 1910.

Q. 38. Has there not been a considerable amount of the money realized from the sale of bonds and capital stock, common and preferred, invested in property other than that used in connection with the railroad company proper?

A. No sir.

Q. 39. To what extent does—what is the ordinary cost of outside property treated by you and your company as property used in connection with the railroad proper? In other words, are the moneys you have invested in coal company stock, or coal company bonds, or in hotels or real estate, not used directly in the operation of the railroad, treated as railroad proper?

A. I should say as far as the Norfolk & Western Railway is concerned, we have very little of any such investments. Of course, if there are any, the income from such investment enters into the income of the railway, and any such items are treated on the exhibits filed today, but the amount we have invested is very small.

Q. 40. Such income would not be treated in the exhibits filed today in connection with the operation of the passenger department of the railway company, would it?

A. If there were any miscellaneous earnings on outside of opera-

116 tions, the earnings would be credited to the Norfolk and Western Railway Income Account, and we show on our exhibits in several places where our earnings from transportation of passengers are increased by this miscellaneous income.

Q. 41. Isn't it a fact that the most of such investments such as warehouses, et cetera, are on the other side of the ledger, so far as income is concerned?

A. Some show a debit, and some show a credit, but where we may have such investments that are on the wrong side that probably represented properties that are used in the interest of the passenger business, such as Dining Cars for the accommodation of the traveling public.

Q. 42. Didn't your company assume in some manner the purchase of a large amount of the bond and stock indebtedness of the Pocahontas Coal Company?

A. The Norfolk & Western Railway Company had a certain amount of money invested in the stock of the Pocahontas Coal & Coke Company, but it is not a large amount. The indebtedness of the Pocahontas Coal & Coke Company is represented by a bonded indebtedness of its own, what we call a purchase mortgage bond, and the money the railway company has invested in the stock is just enough to control the company.

Q. 43. Didn't the railroad company also invest in the bonds issued by the Pocahontas Coal & Coke Company?

A. They may have one or two that they bought on the market recently, but no system of investment was made in it. I think we hold today probably one or two bonds bought to be later
117 on turned into the Sinking Fund of the Coal Company, and the railway company then reimbursed.

Q. 44. What amount of money realized from the sale of the Norfolk & Western bond issues, and the Railway Company stock issues have been invested in coal or timber lands, or coal companies, or other properties not otherwise used directly in connection with the operation of the railway property?

A. As I recall, our investment in the stock of the Pocahontas Coal & Coke Co. is \$501,000. That is simply giving us the control of the stock. We have no interest whatever in the bonds of that company except one or two bonds recently purchased to go into the Sinking Fund.

Q. 45. Did you have investments in any other coal lands, either in West Virginia, or elsewhere in the United States?

A. We have no investment in any outside properties, being particularly free from any such investments.

Q. 46. Ought not the amount of money you have invested in the coal company be deducted from this capitalization in ascertaining the rate of income you would be entitled to for the purposes of this litigation?

A. No sir; I should say not because it is simply an investment in the stock of that company as the means of securing tonnage to the railway company, and it is just like the investment we hold today in the Old Dominion Steamship Company. We hold quite a

large interest in it, and the dividends on that stock enters our income account and goes to the credit of our general Profit & Loss account.

118 Q. 47. What is the income on that stock?

A. I would say, in round numbers, \$12,600.00 a year.

Q. 48. What is the amount of the rate?

A. The Old Dominion Steamship Co. pays 6% annual dividend.

Q. 49. Is that paid out of the earnings?

A. Yes sir; out of the earnings of the Old Dominion Steamship Co., and that goes into our Income Account the same as Bank Interest, or any other credit.

Q. 50. How much do you have invested in that company, or did you have, as of the 30th day of June, 1910?

A. We hold of the Old Dominion Steamship Company 2,100 shares, an investment of \$210,000.00; dividend at 6% would be \$12,600.00.

Q. 51. Were there any common stock or preferred stock given away to the purchasers of your bonds?

A. Not under the reorganization. There may have been some under the old railroad company, but under the reorganization of the railroad company, there was no stock given as a bonus.

Q. 52. At any time since 1896?

A. 1896. You understand, of course, there was stock given in exchange for other funded securities, but not as a bonus.

Q. 53. At the close of your examination in chief, Mr. Coxé you spoke of the decrease of passenger revenues for the year ending June 30th, 1908, and attributed it, as I understand you, wholly to the operation of the two-cent passenger rate then in force in

119 West Virginia; is it not a fact that the freight revenues decreased during this year in a greater proportion than the passenger revenues decreased?

A. For the year ending June 30th 1907 our intra-state passenger earnings in West Virginia were \$362,997.74. Our gross revenue from intra-state freight transportation was \$214,935.09. For the year ending June 30th 1908 our intra-state passenger revenue in West Virginia was \$289,943.22, whilst our revenue from intra-state freight transportation was \$192,469, or a loss on the intra-state passenger business of \$73,054.52; while our loss on the intra-state freight was, in round numbers, \$22,000.00, so that the loss in the transportation of intra-state passenger business is considerably more than the corresponding loss on intra-state freight business.

Q. 54. Was that loss in intra-state freight business occasioned by the decrease in the rate charged, or by the falling off of the business?

A. I should say by the general falling off of business; I can't recall any change in the freight rate situation.

Q. 55. Isn't it a fact that the general financial condition of the country during the greater portion of the year 1908 and part of the year 1909 was the cause of a great falling off of railroad business generally, including both freight and passenger?

A. There is no doubt that the financial depression which over-

120 took the country in the Fall of 1907, and which began to show its effect on the Norfolk & Western Railway earnings in November of that year, caused a decided falling off in our business, but the year 1908 shows on the entire Norfolk & Western System gross earnings to the extent of \$28,962,217.15; while the year ending June 30th 1909, was \$29,327,101.66, or an increase of about \$365,000.00 on the entire system, so that the depression was confined to the Fall of 1907 and a considerable portion of 1908.

Q. 56. From your general knowledge of the railroad business and the condition of other railroads, wasn't that the experience of the other railroads?

A. The period of depression was general all over the country.

Q. 57. And affected the sources of revenue from both freight and passenger?

A. No doubt it had some effect on both classes of business.

Q. 58. In your direct examination you gave, as I now recall, the gross passenger revenue per mile for intra-state West Virginia passenger business for the years 1907 1908 and 1909. Will you give the gross passenger revenues per mile for those years, including the year 1910, including with the intra-state passenger business all other sources of passenger revenue, as well as the inter-state passenger revenue, to which West Va. is entitled?

A. I will have to furnish this information, and will mark it Exhibit "J. W. C. No. 2."

121 Q. 59. Do you compete with other railroads in West Virginia on intra-state passenger business?

A. I can't recall any competition on the intra-state business in West Virginia. We have so few connections there, I don't think we could be said to compete with any of them on intra-state business.

Q. 60. Do you compete with other railroads on inter-state passenger business?

A. We have a certain amount of competition with the Chesapeake & Ohio Railway Company.

Q. 61. Are your rates from those competing points less than the average rate of your passenger business of the entire system?

A. Are they less than the entire system?

Q. 62. Than the average rate of the entire system.

A. That is purely a guess; I should say not.

Q. 63. What is your average passenger rate per passenger per mile for inter-state business on the entire system for the years 1907, 1908, 1909, and 1910?

A. The average rate per passenger per mile on inter-state passenger traffic for the entire Norfolk & Western System is:

For years ending June 30th, 1907, 2.402 cents.

For year ending June 30th, 1908, 2.037 cents.

For year ending June 30th, 1909, 2.229 cents.

For year ending June 30th, 1910, 2.218 cents.

122 Q. 64. You also spoke on your direct examination about the country being sparsely settled in West Virginia through which the Norfolk & Western Railway passes. Isn't it true

that your passenger trains are nearly always crowded on that portion of the railroad?

A. They may be crowded in certain limits; in fact, we find it necessary on some of them which run with frequent stops, and which adds to the expense of the business, to put extra men on trains to collect tickets, but that business is confined to a small space, and taking the entire line, I would say the average is not crowded, but taking the trains in the immediate coal regions they are so well filled that we have to put on extra men to take up tickets, that that is on account of the short space between the stop, to accommodate the public, and that congestion is limited to a certain area. It would not apply to the entire line in West Virginia.

Q. 65. Between what towns does that crowded condition exist?

A. I should say trains running between Bluefield and Welch, and probably trains running each way out of Williamson.

Q. 66. How far is it from Bluefield to Williamson?

A. The distance from Bluefield to Williamson is 106.51 miles, of which 100.77 miles are in West Virginia, 5.45 miles are in Virginia, and .29 miles are in Kentucky.

Q. 67. What proportion do these miles bear to the entire main line mileage in West Virginia, from Kenova to Bluefield?

123 A. The West Virginia Mileage, Bluefield to Williamson, is 100.77, Williamson to Naugatuck 14.8, Naugatuck to Kenova via Low Grade Line, 59.1, Naugatuck to Kenova via 12-Pole Line, 83.5, making 258.17. The distance from Bluefield to Williamson in West Virginia, 100.77, therefore, represents 39% of the West Virginia Main Line Mileage between Kenova and Bluefield, 258.17 miles. Separate and distinct Passenger service being maintained for the accommodation of the public on both the Low Grade Line between Naugatuck and Kenova and on the original "12-Pole" Line between Naugatuck and Kenova via Dunlow.

Q. 68. How much, if any, of the income from operations was used to pay bonds that fell due during the years ending June 30th 1907, 1908, 1909 and 1910?

A. I will say that no bonds were paid off during any of the years in question. We had, however, some Equipment Trust Certificates, for equipment purchased under Trust Agreements, which matured during these years, and which were charged to Income, as follows:

	Total payments.	Chg. income.
Year ending June 30th 1907.....	\$1,500,000	
For which there was appropriated from		
Income in that year.....		\$996,652.06
In 1908 we paid off Certificates aggregating	\$1,600,000	
Of which there was charged to Income..		471,203.46
In 1909 there was paid off Certificates aggregating	\$1,600,000	

124	Of which there was charged to Income	672,252.74
	And in 1910 Certificates were paid aggregating	\$1,600,000
	Of which there was charged to Income ..	<u>\$1,000,000.00</u>
	Total Trust Certificates paid and charged to income in the years 1907, 1908, 1909, and 1910	<u>\$3,140,108.26</u>

I would state, however, that none of the items of Equipment Trust Certificates paid in 1907, 1908 and 1909, and charged to Income, to-wit:

The amounts, \$996,632.06
471,203.46
672,252.74

are included in the amounts shown in Exhibits B-2, C-2, and D-2 under the heading "Deduction for Further Expenses or Betterments" as filed in this case. The amounts representing "Deductions for Further Expenses" as appearing in Exhibit B-2 for year ending June 30th, 1907, Exhibit C-2 for year ending June 30th 1908, and Exhibit D-2 for the year ending June 30th, 1909, are expenditures for "Road" Betterments, and do not include any Equipment.

Q. 69. Has the Norfolk & Western Railway Company for the four years just mentioned, (1907, 1908, 1909 and 1910) paid out of its income from operations of the railroad any amount for interest on its investments in coal companies, steamship companies, or other companies?

A. I think I may say not. I will, however, qualify that, because I believe I know what you are trying to bring out. We have not paid any interest on our investments, but the Norfolk &

125 Western Railway Company does guarantee the interest on the bonds of the Pocahontas Coal & Coke Company, which is purely a Coal Land owning company, and not a mining company or shipping company. The Pocahontas Coal & Coke Company leases its lands to miners of coal and receives a royalty thereon, and if these royalties fail to meet the interest on its bonds, the Norfolk & Western Railway Company agrees to make good the deficit. In this way it advanced in

1907,	\$218,000.00
1908,	192,000.00
1909,	150,000.00
1910,	138,000.00

Q. 70. You stated also on direct examination, as I now recall, that this year, June 30th 1910, the company declared a dividend on preferred stock of four percent, on common stock five percent. Will you state what amount in addition to that was set aside as surplus, and were all the fixed charges, these dividends and the amount set aside as surplus, paid out of the operating expenses of the railroad company?

A. For the year ending June 30th 1910?

Q. 71. Yes, sir.

A. The net income from operation for the year ending June 30th, 1904, was \$9,043,345.35. This did not include in the operating expenses any form of additions or betterments, the operating expenses being restricted to the actual operations and repairs.

124 From this net income of \$9,043,345.35 there was allowed expenditures to maintain the earning power, and to offset deficiencies \$3,573,598.32. The balance was \$5,469,747.03, from which was deducted payments to the Prothonotary Court & State Co. on account of deficiency of Sinking Fund and interest on Prothonotary joint bonds of \$330,000; cash dividends on stock, preferred 5%, and common 5%; the preferred dividend being \$105,000, and the common stock dividend being \$1,250,000.00, or a total of \$4,352,500.00 leaving the amount carried to Profit & Loss for the year \$1,117,247.03, from which was deducted the income and commission of securities sold of \$21,875.00.

Q. 72. Isn't it true that the Norfolk & Western Railway Co. earned during the year ending June 30th, 1904 about 12% on its capital stock and bonded indebtedness, after the payment of operating expenses and fixed charges?

A. No, sir.

Q. 73. What did it earn?

A. The net income, after providing for additions and betterments for the year ending June 30th, 1904, was \$5,469,747.03. From that I deduct the 5% dividend on the preferred stock of \$105,000, and the balance is \$5,364,747.03. The capital common stock outstanding is, in round numbers, \$10,000,000.00 which receives on this basis a return of 5.36%, which, however does not provide for the deficit of earnings to meet interest on Norfolk & Western Prothonotary joint bonds, and taking both preferred and common stock the average rate of return is 5.05%, which also fails to provide for deficit of earnings to meet interest on Norfolk & Western Prothonotary joint bonds.

127 Q. 74. If you include in the net earnings of the railway company all money spent for the purchase of additional equipment, the operation of its line and all other improvements, what percent would it pay?

A. I would say that we did not include in our additions and betterments any new line, or any actual additions to the property, the \$3,573,598.32 being for "Roads" improvements, and the payment of the principal of equipment cost, which we felt was necessary to maintain the book value of our equipment. Taking the net income of \$9,043,345.35, and deducting therefrom the deficiency of interest on Norfolk & Western Prothonotary joint bonds of \$135,000, we have left as available \$9,008,345.35, which yields a return on the capital stock outstanding of 9.00%, but which makes no provision for the expenditure of \$3,573,598.32, which our management felt to be a proper charge against the gross earnings of the company. These expenditures being made to maintain the earning power of the property, and which should not properly be capitalized.

Q. 75. Is your report to the Board of Public Works for the year

It is not customary in working up statistics of Intra-state passenger traffic such as passengers, passengers-one-mile and Revenue, 130 to keep separate the passengers carried on the various forms and varieties of tickets, so that whilst we have the total results for these two years, we have not the detail as asked for by the Attorney General, and to answer his inquiry would necessitate our again going over the detail of conductors' reports, which as above stated is not now available for the entire year ended June 30th 1907, and for that portion of the year ended June 30th 1909, from July 1st 1908, to February 1909.

Counsel for the defendants reserves the right to further cross examine the witness after the defendants have had time to examine the exhibits already filed by the witness and analyze them.

Redirect examination.

By Mr. REATH:

Q. 1. Mr. Cox, you have described in your cross examination the general effect of the depression which began in the autumn of 1907, as affecting the company's revenues generally. Please state what was the West Virginia intra-state passenger business of the Norfolk & Western Railway in 1907, and whether the volume of the business decreased in 1908 and subsequent years?

A. Whilst the volume of the West Virginia intra-state passenger business increased in 1908 over 1907, the revenue derived 131 therefrom was materially less, owing to the reduction of the rate from three cents to two cents.

	Passengers.	Passengers-one-mile.	Revenue.
Year ending June 30, 1908...	935,223	14,995,214	\$289,943.22
Year ending June 30, 1907...	815,506	13,925,247	362,997.74
1908 excess	119,717	1,069,967	
1908 Deficit			73,054.52

Q. 2. What about 1909, as compared with 1908?

A. The comparison of West Virginia intra-state passenger one-mile for the years ending June 30th 1909 and 1908, and the revenue thereon was:

	West Va. passengers-one-mile.	Revenue.
1909	14,592,121	\$281,864.50
1908	14,995,214	289,943.22
Decrease in 1909	402,593	8,078.72

Q. 3. Now, comparing 1909 with 1907, was 1909 greater in volume or less?

A. The comparison of West Virginia Intra-state passengers traffic for the year ending June 30th 1909 as compared with 1907 was:

	West Va. intra-state pass-engers- one-mile.	Revenue.
1909	14,592,621	\$281,864.50
1907	13,025,247	362,997.74
1909 Increase over 1907	1,567,374	
1909 Loss of Revenue		\$81,133.24

That is whilst we carried 1,567,374 more passengers-one-mile in 1909 than in 1907 we received in 1909 \$81,133.24 less revenue.

At 6:10 P. M. the taking of this deposition was adjourned until 30th day of January, 1913, at Roanoke, Va.

STATE OF VIRGINIA,

City of Roanoke, To wit:

I, Carl B. Short, a Notary Public for the State and city aforesaid, do hereby certify that the foregoing deposition of Jos. W. Coxé was duly taken by me at the time and place and for the purpose mentioned in the caption hereto.

Given under my hand and notarial seal this 8th day of February, 1913.

CARL B. SHORT,

Notary Public. [SEAL.]

My term of office expired on the 7th day of Oct. 1912.

By the laws of Virginia no tax is required upon this seal.

133 Office of General Attorney, Norfolk & Western Railway Co.,
General Office Building, Norfolk & Western Railway,
Roanoke, Va.

THURSDAY, January 30, 1913—11 a. m.

By agreement of counsel the taking of depositions in the case of Norfolk & Western Railway Company v. Wm. G. Conley, et als., was resumed at above time and place for the purpose of further cross-examination of witness Joseph W. Coxé by the Attorney General of West Virginia.

Present:

Lucian H. Cocke, Esq., Attorney for Complainant, and Wm. G. Conley, Esq., Attorney General of the State of West Virginia, for Defendant.

Jos. W. COXE, a witness heretofore introduced and examined on behalf of the Complainant, appearing for further cross-examination by defendant.

By Mr. CONLEY:

X Q. 1. Mr. Cox, will you please state how you calculate the intrastate earnings of \$362,997.24 for the year ending June 30, 1907, as shown on page 6 of your original, testimony?

A. The gross revenue from the transportation of West Virginia intrastate passengers for the year ending June 30, 1907, was \$362,997.24. That is the revenue derived from passengers exclusively, and is worked up from the ticket reports, cash fare reports, and the interline reports from foreign companies.

X Q. 2. Do you mean that those figures are actual figures?

A. Yes, we claim these to be actual figures from the transportation of intrastate passengers.

X Q. 3. And do not include any earnings from excess baggage or express or any other income in the way of passenger revenues?

A. No, I should say not. I will say in that respect that my recollection is in working up the data from our records for the original bill, upon which this litigation was started, that was all the information we were asked for by our Legal Department; but when we worked up our exhibits we did add earnings from mail, express and the news privilege, and all of the different items of passenger train earnings.

X Q. 4. In what exhibit is that shown?

A. That will appear in Exhibit B-2.

X Q. 5. Again referring to page 6 of your original deposition, answer to direct question 21, will you please state how you determined the proportion of gross earnings of \$8,090,082.56 attributed to West Virginia for the year ending June 30, 1907?

135 A. That amount of \$8,090,082.56 represents the gross earnings from passenger and freight, intrastate and interstate, West Virginia. The amount is made up of passenger business inter and intrastate and freight business inter and intrastate. I would say in a general way as far as the freight is concerned that from our records we prepare at the end of each month what we term abstracts showing the point from and the point to of all freight movement. We subsequently analyze that by state lines so as to get the earnings in each state. Similarly with the passenger business, from our reports of ticket sales, cash fare reports, etc., we prepare abstracts of the passenger business, getting first the grand total and then prorating it to get the earnings by states. To these abstracts of passenger business proper, and freight business proper, we add our various miscellaneous earnings from other sources, in the way of excess baggage, mail, express, news privileges, and the other various items of passenger earnings of a sundry character, what we term byproducts; and similarly with the freight, adding to the earnings from the actual movement of freight the miscellaneous earnings, and in that way get the aggregate total of \$8,090,082.56.

I think I may safely say that that is an actual, or a closely actual statement of the gross earnings.

X Q. 6. I suppose you use the same method in all of the subsequent fiscal years?

A. Yes sir; the same general formula as far as I can recall was followed in each subsequent year, it having been our practice
136 for some years past to have made up statements of earnings from passenger and freight by States.

X Q. 7. Referring to page 7 of your original deposition please tell me how you arrive at the figures \$31,000,051.45, in answer to question 23, showing the capital employed in the State of West Virginia?

A. That, as I recall it, was the assessed value of the property for taxation purposes as established by the Board of Public Works of West Va.

X Q. 8. Please refer to page 33 of your original testimony and see if the valuation for 1908 of \$31,000,000 was arrived at in the same manner; and also refer to page 34 of your original testimony and see if the valuation of \$32,000,000 was arrived at in the same manner.

A. The amount of \$32,000,000 used in Exhibit D-2 for the year June 30th 1909 is also the value of the property as assessed for taxation by the Board of Public Works of the State of West Virginia. As regards the amount, \$31,000,000 which appears on Exhibit C-2 for the year ending, June 30th 1908, that is the value of the property as assessed for taxation by the Board of Public Works of West Virginia.

X Q. 9. Do these figures or do they not represent the true value of the property of the Norfolk & Western Ry. Co. in West Virginia?

A. They represent the assessed value as made by the Board of Public Works. I am under the impression that in arriving at that assessment the Board of Public Works figures that the amount
assessed represents about 80% of what they consider the
137 actual valuation based upon their methods of assessment.

X Q. 10. What is your opinion as to the \$31,000,000 for the year 1908 and the \$32,000,000 for the year 1909 as representing the true value of the property of the Norfolk & Western Ry. Co. in West Virginia.

A. I do not know hardly how to answer that question, General. As I say, they are the values which the Board of Public Works of West Virginia put upon our property for the years stated; and, as I say, under their plan I have always understood that they assessed what they considered was 80% of the true value, their idea being to allow for emergencies in case of sale, and to adopt a liberal position in dealing with the tax situation.

X Q. 11. At the bottom of page 7 of your original deposition you state that it took 85.40¢ to earn every intrastate passenger dollar in the year ending June 30th 1907; and on page 29 of your original deposition, in answer to question 76, you state that it cost 95 cents to earn every intrastate passenger dollar for the year 1908; and on

page 35, in answer to question 95, you state that it cost 97.06¢ not including taxes to earn every intrastate passenger dollar for the year 1909. Are these costs in each case the average of all passenger business.

A. I would say for the purpose of these exhibits, and I will now particularly mention exhibit D-2 for the year June 30, 1907 that where I show ordinary operating expenses as representing a certain percentage of gross earnings I have assumed that the cost of earning a dollar was the same on all classes of passenger business.

138 X Q. 12. Are the percentages quoted by you computed correctly?

A. I show for the year ending June 30, 1907, that the percentage of ordinary operating expenses to earnings is 82.20%, and the percentage of ordinary operating expenses and taxes to earnings is 85.40%. For the year ending June 30, 1908 I show percentage of intrastate passenger expenses to earnings are 95%; and for the year ended June 30, 1909, as per Exhibit D-2, that the percentage of intrastate passenger expenses to earnings is 100.55%. The by-products in each case being included in the earnings.

X Q. 13. Including taxes?

A. Yes, sir.

X Q. 14. I believe you also stated that the cost of doing intrastate passenger business is in excess of the cost of doing all business, did you not?

A. The cost of doing intrastate business?

X Q. 15. The cost of doing intrastate passenger business, yes.

A. Yes, it is in excess of the cost of doing all passenger business. I would say as a general proposition that that was the case; that I believe it to be a fact that the intrastate passenger business is conducted at a higher cost than the interstate passenger business.

X Q. 16. How much higher?

A. That I have never figured, but in this proposition I simply assume that the cost of earning a dollar was the same in either case, that is, both in Interstate and Intrastate passenger business.

139 X Q. 17. Why do you assume that the cost is the same?

A. In working up these exhibits I was first under the impression that the only feature that would be considered in this investigation would be intrastate passenger business. That as I recall was the proposition put up to me by the Legal Department, to furnish them figures showing what I considered the result. I might have confined my exhibit right to that particular feature, because I think that was all that Mr. Reath asked for, but in order to get that I had to determine the passenger expenses in the State, and the intrastate portion of it. In debating the matter in my mind, and in order to be on the safe side to present the best possible phase on behalf of the State as against the Railway Company, I assumed that the cost of earning a dollar was the same on either class of business. Had I at the time been figuring on the freight and felt that the freight would come in with the passenger I would very likely have arranged my exhibits so as to show "a load" on the cost of intrastate freight, but as far as the passenger business was

concerned I did not feel as clear on that as I did on the freight. But, as far as the exhibits are concerned, all of the information other than the intrastate columns, you might say, was in one sense, gratuitous but merely worked out to show the entire situation in the State. The issue I had immediately in mind was the Intrastate Passenger Business. In making up these exhibits I felt that I would be thoroughly safe in preparing figures in which I assumed that the cost of earning a dollar was the same for intrastate as for interstate passenger business.

140 X Q. 18. Mr. Coxe, have you made an estimate or an examination as to the cost of doing intrastate freight business in West Virginia as compared with the cost of doing interstate freight business?

A. No sir I cannot say that I have.

X Q. 19. On what basis are your exhibits made up in relation to the freight business?

A. The freight was worked up on the same plan, assuming that the cost of earning a dollar would be the same in either case, intrastate or interstate, on the freight business.

X Q. 20. Was that assumption made regardless of any earnings on the part of the freight?

A. I think I may say that that distribution was practically based upon the respective earnings and the division of expenses between intrastate and interstate. In working up these exhibits my idea though was more on the cost of earning a dollar; that was running in my mind, but it practically amounts to the same thing; that I have divided the freight expenses between interstate and intrastate on the basis of the respective earnings.

X Q. 21. These exhibits then were made up regardless of whether the rate by which a dollar was earned was high or low?

A. The great predominating freight business shown on these exhibits is the interstate business, the earnings for the year 1909 being \$6,809,000.00 as compared with \$164,000.00, intrastate freight earnings, and the division of expenses as between the two classes of business was based upon the respective proportions
141 which each class of earnings bore to the total amount of earnings.

X Q. 22. Does that mean that the actual rate per ton per mile for freight was not considered?

A. The actual rate per ton per mile for hauling it—do you mean the cost of hauling it?

X Q. 23. Yes.

A. No sir; that was not considered in making the calculation.

X Q. 24. Is not the operating per cent the relation between earnings and expenses?

A. How is that?

X Q. 25. Is not the operating per cent the relation between the earnings and the expenses?

A. Yes, sir; if you have a certain amount of gross earnings and a certain amount of operating expenses, and divide your earnings

into your expenses, you have what is represented as the cost of earning a dollar of that business.

X Q. 26. In making up your exhibits then you have considered only one side of the question, that is, the earnings, have you not?

A. I have the earnings and the total expenses, both. I know what my gross earnings are on freight, and I feel reasonably sure that my freight expenses are correct in total. The question is simply a sub-division of that expense between intrastate and interstate.

X Q. 27. Are you as certain of the cost, that is, of your expenses, as you are of your earnings?

142 A. I would say as far as the total freight and passenger expenses are concerned that there would not be the same feeling of absolute reliance that there would be in the case of the earnings, because we worked the freight and passenger earnings up from positive sources, whereas with expenses there are questions as to division between passenger and freight which do not accrue in the case of earnings. As far as the total earnings are concerned we are satisfied as to their accuracy.

X Q. 28. Do you know then how much more it costs per ton per mile to do intrastate freight business than to do interstate freight business?

A. As a general proposition, from what I know of the character of the freight traffic in West Virginia, I would say that the larger percentage of the intrastate business being interchanged with branch lines, and the larger percentage of it being less than carload, that the cost of handling intrastate business would be materially greater than the cost of handling interstate business.

X Q. 29. Please give me how much greater would be the cost of doing intrastate than interstate business, either in percentage or some ratio?

A. Well, I may say ten times greater.

X Q. 30. On what figures, if any, do you base that statement?

A. Well, simply from a general knowledge of the business, and from what I realize, based on experience in matter, is the
143 additional expense in labor involved in handling intrastate business on the Norfolk & Western Ry. that would not prevail in the case of homogeneous interstate business that we handle.

X Q. 31. Did you ever make an actual calculation of the relative costs?

A. No sir; not that I recall.

X Q. 32. What percentage of intrastate freight business is less than car load?

A. Excluding coal and coke I can give you the percentage of intrastate business.

X Q. 33. Less than car load?

A. Yes. Car load represents 14%; and I would add that that is based upon the tonnage handled in the month of May 1910.

X Q. 34. How about the percentage of interstate freight less than car load?

A. The percentage of interstate freight less than car load is 2%.

That is, on the line between Bluefield and Williamson for the month of May 1910.

Mr. COCKE: Does that apply solely to merchandise?

WITNESS: That applies solely to merchandise.

X Q. 35. What is the difference between the Interstate freight rate per ton per mile and the intrastate freight per ton per mile in West Virginia?

A. Do you mean the tariff rate or the rate for transportation?

144 X Q. 36. I mean, the actual rate that you charge and collect as shown by the receipts per ton per mile.

A. The receipts per ton per mile would be materially greater on intrastate than it would be on interstate business.

X Q. 37. How much greater?

A. The average rate of revenue per ton per mile for the year ended June 30, 1907, on intrastate freight was 2.88¢, and on interstate freight it was .51¢.

X Q. 38. On what class of freight?

A. That is the average of all freight, intrastate and interstate respectively.

X Q. 39. How many times greater then was the intrastate freight charge than the interstate freight charge, per ton per mile?

A. In round numbers it would be 5.65 times greater in the case of intrastate freight than interstate freight.

X Q. 40. Can you state the freight rate per ton per mile that you charge for ordinary freight, such as merchandise and the local freight usually handled?

A. I could not off-hand. I could look it up.

X Q. 41. Have you a classification here that you could look at and answer now?

A. I do not know that I am sufficiently familiar with the tariff rates to read them off offhand. I have a memorandum here that I made up some time ago, in which I have some average rates per ton per mile.

145 X Q. 42. Is that West Virginia intrastate?

A. Yes, in West Virginia the intrastate freight rate, on ice, for instance, is 3½ cents per ton per mile on 20 mile haul.

X Q. 43. Do you know what is the maximum local rate that you can charge for that sort of freight in West Virginia?

A. I do not. That is a matter that would rest with the Traffic Department. I presume they are familiar with that matter.

X Q. 44. Well, will you file an exhibit as a part of your testimony showing the intrastate freight rates per ton per mile for the different classes of freight hauled over the N. & W. Ry. in West Virginia, and showing separately the freight rate per ton per mile for coal, coke and lumber?

A. As I understand it in West Virginia, there are different blocks of distances.

X Q. 45. Yes, ten miles is the basis I will say. I wish you would furnish me this information as provided by serial section 2493 of

the Code of West Virginia of 1906, and as to classification, see the Acts of the Legislature of West Virginia of 1895, chapter 17.

A. I will endeavor to furnish such data.

X Q. 46. Mr. Coxe, you stated that on an average the intrastate West Virginia freight rate over the interstate West Virginia freight rate was about 5.7 times greater. To what year did these figures relate?

A. To the year ended June 30th 1907.

X Q. 47. How much greater is the intrastate freight rate for the — ending June 30, 1910?

146 A. The average rate per ton per mile intrastate freight for the year ended June 30, 1910, was 3.27¢, and on interstate freight .45 cents.

X Q. 48. What per cent does that represent?

A. 7.3 times, greater for intrastate freight.

X Q. 49. Have you at hand the percentages for the year ended June 30, 1911, and for the year ended June 30, 1912?

A. No, sir; I have not.

X Q. 50. How did you assign the cost of passenger transportation,—enginemen, trainmen, and fuel,—in the cost as shown in your exhibit? Were they assigned to each operating division on actual figures, or what method did you pursue?

A. The cost of enginemen would be divided by each operating district.

X Q. 51. What about trainmen?

A. The cost of trainmen would be applied in the same way. They have different runs on different districts, and it would be charged in that respective district.

X Q. 52. How about fuel?

A. Fuel would be based on the consumption on each operating division.

X Q. 53. How are the men paid; on a mileage basis?

A. The engineers?

X Q. 54. Yes, and trainmen.

A. They are paid as a general proposition on the—I cannot say exactly the mileage basis but it is on schedule rates agreed upon with the management. In some cases it may be on a day rate, and again on a mileage rate as you state.

147 X Q. 55. And they are usually based as nearly as possible on hundred mile runs, are they not?

A. I would say as a general proposition that they are based on a minimum of 100 miles.

X Q. 56. Then the expense follows in a general way the train mileage or the engine mileage?

A. I should say that was the case as a general proposition.

Q. That is, for these particular expenses enumerated in my former question?

A. That is, the wages of train crews?

X Q. 57. Yes.

A. Yes.

X Q. 58. How about the fuel charged?

A. The fuel would be charged to the district where consumed.

X Q. 59. Would it not more nearly follow the car mileage than the engine mileage?

A. I cannot say that it would, no sir.

X Q. 60. Doesn't it take as much fuel for a short train as it does for a long train?

A. No, as a general proposition a train of equal lading would consume less fuel on a 50-mile run than it would on a 100-mile run.

X Q. 61. Then, while the weight has something to do with that factor of it you think it more nearly follows the engine mileage rather than the car mileage, for fuel I mean?

A. I do not know as I fully get the import of your question, but the coal would undoubtedly vary with the mileage of the engine. If there were more engine mileage there would be more coal consumed as a general proposition.

X Q. 62. Mr. Coxe, did you not in making up your expense account filed with your exhibits use in them car mileage as the basis?

A. No sir.

X Q. 63. You did not?

A. The only feature where car mileage would come in would be to divide geographically—where we have distributed certain general expenses that were not allocated, such as salaries of officers, on the basis of car miles geographically.

X Q. 64. Mr. Coxe, on page 17 of your original testimony, or, I mean your direct examination, in answer to question 46, you say that you divide each division between the States where they overlap on the basis of the mileage of track in each State.

A. Yes, sir.

X Q. 65. Did you use that method as to all of the exhibits filed with your deposition? You were then particularly speaking of Exhibit A.

A. Yes, I should say that would be correct. I had not noticed before that I have used the term "miles of track" whereas the basis was miles of road. Probably used that term inadvertently. I see that my answer reads "that is sub-divided between the States through which that division runs on the basis of mileage of track in each State." I should have said, on the basis of miles of road in each State.

149 X Q. 66. What per cent of freight car miles from Williamson to Kenova would be shown when compared with the total of the Kenova Division, which Kenova division extends from E. Williamson to Portsmouth, Ohio, as I understand it, using the year ended June 30th, 1910.

A. That can be answered but not on the spot here.

X Q. 67. Will you take these figures that I give you now subject to verification: For the year 1910 freight car miles E. Williamson to Kenova, in West Virginia, 51,103,084, and from Kenova to Portsmouth, Ohio, 21,124,546; West Virginia percentage 70.75%.

A. The percentage of freight car miles on the line E. Williamson to Kenova is 70.75% of the total car mileage E. Williamson to Portsmouth, according to my computation, these figures being submitted by Mr. Hillman subject to verification by the records of the Car Record Office of our Company.

X Q. 68. You are at liberty to put in the record the proper figures if you should find these incorrect.

A. I have no doubt these are correct, but would like to confirm them.

X Q. 69. Will you do the same as to the passenger car mileage for the same division, taking the following figures for verification: E. Williamson to Kenova 988,055, Kenova to Portsmouth 574,258, total 1,562,311; percentage of division in West Virginia 63.243%.

A. The passenger car miles E. Williamson to Kenova as quoted by General Conley as being 988,053 and from Kenova to Portsmouth as being 574,258, the total being 1,562,311 my calculation shows the car miles from E. Williamson to Kenova would represent 63.243% of the total, but these figures as I understand are submitted subject to verification by the figures of the Car Record Office of this Company.

(And at this point, the hour of 1 o'clock having arrived, a recess is taken until 2:30 p. m.)

151

Afternoon Session.

THURSDAY, January 30th, 1913.

The taking of deposition was resumed at 2:30 p. m. at same place, pursuant to recess from morning session, with the same parties present.

JOS. W. COXE, A witness heretofore introduced on behalf of complainant, on the stand on Cross-Examination.

By Mr. CONLEY:

X Q. 70. Mr. Cox, can you give the freight engine miles exclusive of switching on the Kenova Division in West Virginia and on the Kenova Division in Ohio for the year ended June 30, 1910, and what per cent of the total is made in West Virginia.

A. I have not before me data which will enable me to say what the relative engine miles on the line between Kenova and Portsmouth are in West Virginia and Ohio.

X Q. 71. I understand your records are such that you can readily refer to them, and will ask you to have them brought down and give us the figures.

A. I do not believe we could give you the actual figures in West Virginia and Ohio if the figures which you gave us this morning are supposed to be the actual figures. I cannot verify them. I tried to verify them and have not anything that will verify them. The figures you quoted this morning on freight car lines was, E. Williamson to Kenova 51,103,084, and from Kenova to Portsmouth 21,124,546. My mileage E. Williamson to Kenova shows 59,507,444, and from Kenova to Portsmouth 12,719,286, or a total of 72,227,630.

X Q. 72. Can you give us the figures for passenger car miles for the same year and on the same divisions.

A. From E. Williamson to Kenova the Attorney General read this morning 988,053 passenger car miles. Our sheets seem to show for that time 1,287,188. And the other figures, from Kenova to Portsmouth, which the Attorney General read this morning, were 574,258 passenger car miles, whilst our sheet seemed to indicate 275,123, that being for the year ending June 30th 1910, or a total of 1,562,311.

X Q. 73. What per cent does that give?

A. Well, that would give 82.39% on line E. Williamson to Kenova, and 17.61% on line Kenova to Portsmouth.

X Q. 74. Can you give the freight engine miles exclusive of switching on the Kenova division in W. Va. and on the Kenova division in Ohio, and what per cent of the total the West Va. portion is, and what per cent of the total the Ohio portion is.

A. I will have to look that up.

X Q. 75. Will you give the same information for passenger engine miles for the same division for the year 1910.

A. I will undertake to furnish that but can you give us your figures?

X Q. 76. I give you the following figures for the freight engine miles on this division subject to verification: E. Williamson to Kenova in W. Va. 1,460,221, and from Kenova to Portsmouth 578,919, or, a total of 2,039,140; percentage in West Virginia

153 71.61%. The same for passenger miles in West Virginia is, E. Williamson to Kenova, 187,197, and in Ohio 118,191, or a total of 305,388; percentage in W. Va. 61.3%.

A. All right.

X Q. 77. Will you give us your freight train mileage, including mixed trains, and all other freight, for that part of the Kenova Division in W. Va. E. Williamson to Kenova, and also the same information for the Ohio portion of this division, Kenova to Portsmouth, for the year 1910. I can give you the figures we have if you wish them.

A. All right.

X Q. 78. I give you the following figures subject to verification: In West Virginia, regular trains, 1,251,404, and mixed trains, 5,186; total, 1,256,590. In Ohio regular and mixed trains, 522,112, or a grand total of 1,778,702. Percentage in West Va. 70.65%.

A. Now can you give me the passenger?

X Q. 79. I wish the same information as to passenger train mileage in West Virginia and in Ohio, Kenova Division, including mixed trains. Do you wish our figures?

A. Yes.

X Q. 80. Passenger train mileage including mixed trains on this division in West Virginia, subject to verification, is furnished you as follows: 187,927, in Ohio, 111,774. Percentage in West Virginia 62.70%.

A. We will desire to verify these figures by our records.

154 X Q. 81. What was the truck mileage of the Kenova Division in West Virginia for the fiscal year ended June 30, 1910?

A. \$2.50% of road mileage, not track mileage, not including gas (tolls and franchise).

Q. Q2. What is the difference between "road mileage" and "track mileage"?

A. Track mileage would include all mileage and double track. Road mileage is simply the miles of main line and branches. I had the same thing this morning when I corrected your track to road.

Q. Q3. Can you give the percentage of track mileage on the Commerce Division in West Va.?

A. I could not without looking it up. I have the track mileage but not the road mileage.

Q. Q4. Which did you use in allocating your expense to West Virginia?

A. I used road mileage.

Q. Q5. And that is 22.50%?

A. Yes, 22.50%.

Q. Q6. It will not then be necessary to work up the track mileage. Mr. Cross, is it not a fact that your showing of cost allocated by you to the Federal cost for carrying passengers, being about \$25.00 cents for 1907, and 45 cents for 1908, and 100.00 cents in 1909 depend on one of the factors on the operating cost changed in West Virginia?

A. I should say that that was the case. But the total expense charged to West Virginia on the passenger matter is in the 125 cents reflected on the interest bearing mortgage, and consequently in the percentage of operating cost.

Q. Q7. Mr. Cross, will it come 15 of your direct maintenance and also what per cent of road track in West Virginia is on your Potomac and Kanawha Divisions, as was the the year 1907?

A. What portion of page 15 do I stand on?

Q. Q8. How much the latter part which you put "initially" the Potomac Division showed as Williamsburg 25.75 miles the 5.28 miles in Virginia at 1.00%, and 200.00 miles in West Va. at 20.00%? Please consolidate the mileage in West Virginia to divisions and give us the total West Virginia mileage on the Potomac and Kanawha Divisions.

A. The total miles in 1907 in West Virginia was 200.00, and the total miles on the Potomac and Kanawha Divisions in West Virginia was 200.00. Do you want to know what the percentage is as shown then of the total West Virginia mileage?

Q. Q9. Was 20.00% I think it is.

A. Yes, 20.00%.

Q. Q10. Can you give me the percent for the year 1909?

A. Yes. 27. The total mileage in West Virginia in 1909 was 200.00, as shown mileage on the Potomac & Kanawha Division in W. Va. was 215.00 or 21.50% of the total.

Q. Q11. If the figures reflected on the Potomac & Kanawha Divisions is correct per mile that the other three roads is not in

For that reason even in the year 1909 when I say that the engine miles were 21% passenger and 79% freight we still adhered to the 20% passenger and 80% freight as a means of facilitating the and expediting the work.

X Q. 103. If you were on the Chesapeake & Ohio Ry. Co. as stated in my question above, would you use the actual figures as shown by the books of the Chesapeake & Ohio Ry. Co. or percentages derived therefrom, or would you carry your experience from the Norfolk & Western Ry. Co. over to that road, and use 20% for passengers regardless of what the actual figures of the C. & O. Ry. Co. might show?

A. No, sir; I should say not. I think I should be inclined on the C. & O. Ry. Co. if I found the engine mileage 25% for passenger and 75% for freight to use that percentage instead of 20% and 80% as we use on the Norfolk & Western. I just want to add on that point that it is very important in order to expedite the work to have round percentages. For instance, 21% and 79% would be very awkward to figure on all these general expense bills. If on the Chesapeake & Ohio Ry. I found it necessary I would probably stretch the percentages a little; that is, if I found it 26 and 74 I would probably continue to adhere to my 25 and 75; or, probably if it dropped down to 24% passenger and 76% freight I would continue to adhere to 25 and 75, which would be a very close approximation of the actual percentages.

X Q. 104. Based on their figures?

A. Yes, based on their figures.

X Q. 105. Will you give us the revenue from passenger engine miles and the total revenue from engine miles on the Potomac Division and that part of the Kenova Division in West Virginia for the year 1910, stating the minimum engine miles as $\frac{1}{4}$ passenger and $\frac{3}{4}$ freight?

159 A. That would have to be calculated.

X Q. 106. I give you the following figures for verification:

Division.	Class.	Freight.	Passenger.
Potomac	Regular	2,429,157	471,585
	Mixed, $\frac{3}{4}$ Frt.	5,558
	Mixed, $\frac{1}{4}$ Pass.	1,852
Kenova in W. Va.	Regular	1,469,221	187,197
	Mixed, $\frac{3}{4}$ Frt.	2,968
	Mixed, $\frac{1}{4}$ Pass.	1,900
Totals		3,898,844	661,932

What percent does that give to passenger? Our figures are 14.59%. See if that is correct?

A. Our figures and yours are closely together. The percentage as we make it in round figures, based on the figures which you are giving us of course, are, for passenger 14.57% and freight 85.43%.

X Q. 107. That is on the basis of $\frac{3}{4}$ for freight, and $\frac{1}{4}$ for passenger?

A. No, it would be 84.26% for freight and 15.74% for passenger.

on that basis of distributing the mixed trains, $\frac{3}{4}$ freight and $\frac{1}{4}$ the passenger.

X Q. 108. That is, your total mileage instead of showing 14.59% for passenger shows 15.74%?

A. Yes, on the formula suggested by you and worked out on the mileage which you furnished.

X Q. 109. Your freight and passenger mileage is not the same as we quoted, then?

A. No.

X Q. 110. Then, if you would add to your 15.74% the small portion for the Shenandoah and Radford divisions in West Virginia you would have about 16% for passenger and 84% for freight, would you not?

A. That is prorated on the mileage basis. The percentage including that shows freight 83.77% and passenger 16.23%. This is West Virginia engine mileage now you understand, including the Shenandoah and the Radford Division.

X Q. 111. What was the total passenger and freight engine miles as found on page 23 of your printed annual report for the year 1910?

A. The total passenger revenue locomotive mileage was 4,024,128, and freight was 15,139,357 making a total mileage for regular trains, passenger and freight, 19,163,485.

X Q. 112. What about mixed trains?

A. The locomotive mileage was 191,574.

X Q. 113. Making a total for regular and mixed trains of how much?

A. 19,355,059.

X Q. 114. And as to passenger trains it is what?

A. 4,024,128.

X Q. 115. Adding one fourth of the mixed trains as passenger what does it make?

A. 4,972,922 miles.

X Q. 116. Mr. Cox, will you now deduct from the system total the West Virginia totals from which you produced your 16.23% passenger, and give the passenger percentage for the balance of the road outside of West Virginia.

A. The percentage of the line outside of West Va. would be, freight 77.25%, and passenger 22.75%, this being based upon the result June 30, 1910.

X Q. 117. Mr. Cox, why would you treat the West Virginia divisions of your line differently from the way you would treat the separate roads when it was necessary to show the cost in West Virginia, as it is in this case?

A. The 20% which has been applied to the common items is the percentage based upon the passenger and freight road engine miles of the system, and I have not treated it any differently as I see on that line from the balance of the lines.

X Q. 118. If you take into consideration only that part of your system treated in West Virginia you will find that only 16.23% of

the engine mileage is passenger, while outside of West Virginia it is 22.75%, is it not?

A. Yes, sir.

X Q. 119. Why do you discriminate between the whole and the portion in West Virginia?

A. Well, on that basis if I had applied this percentage of 22.75 I would have been more severe on the line in West Virginia. I have however only treated it on the percentage based upon the system road engine miles.

X Q. 120. Isn't 22.75 the percentage outside of W. Va.?

A. Yes.

X Q. 121. What is the percentage then in West Va.? Isn't it 16.23%?

A. Yes, 16.23%.

X Q. 122. If that part of your line in West Virginia were separated from the Norfolk & Western, say like the C. & O. Ry. Co., and you were Auditor of that road, would you not use the actual figures, or would you use 16.23%?

A. I would use a percentage based upon the road engine miles, passenger and freight, on the C. & O. Ry.

X Q. 123. Then if that part of your road in West Va. were a separate line and had a separate name would you use 16.23%?

A. I would use whatever per cent was based upon the road engine mileage, passenger and freight.

X Q. 124. Pertaining to the matter of allotting capitalization to West Virginia, as stated on page 7 of your direct examination that for the year 1907 the earning per cent of intrastate total was \$1,391,902.31, did you not?

A. Yes, Sir.

X Q. 125. And that this sum was 4.49% of the \$31,000,051.45 assessed value of property in West Virginia, did you not?

A. That is a fact.

X Q. 126. And you continue the same value, \$1,391,902.31 in 1908, as stated on page 31 of your direct examination, regardless of the fact that the earnings had changed in that year, and you say it was "certainly no less" meaning in 1908?

A. I would say that the assessed value of the property was practically the same in both years, 1907, and 1908. In the exhibit for 1907 I allot of the total capital to intrastate passenger business \$1,689,502.81 and figure a return on that basis. For the year ended June 30, 1908 I take the return on Intrastate passenger business at a valuation of \$1,519,000.00. The gross earnings in 1907 being \$8,090,082.56, and in 1908 \$7,429,544.14. I think possibly there may be a little confusion in these figures for the reason that all of these exhibits show the figures quoted in the bill upon which this action was brought, and on the same exhibits I show the figures upon which we are working out our returns, which are a little different from the figures shown in the bill.

X Q. 127. I wish you would refer to page 7 of your direct examination and see if it is not \$1,391,902.31 quoted in answer to question 23, near the middle of the page?

A. I am under the impression that that series of questions was put by Judge Holt, and that he was referring to the bill which the Norfolk & Western Ry. Co., had filed, because I see at the bottom of page 7 that I stated the gross earnings from passenger were \$362,997.74, being from the transportation of passengers exclusively, and those were the figures which were used in the bill. In the exhibit afterwards made up however I have shown the original figures used by Mr. Reath in preparing his bill, as well as the figures showing the addition of the byproducts, and show larger earnings and somewhat larger capital in that way.

X Q. 126. Mr. Cox, turning to page 56 of your direct examination see if you do not use the same figures as to valuation, \$1,391,902.21 for the year 1909, when the percentage was only 3.63 instead of 4.49 in the previous year.

A. The percentage upon which we worked the return in 1909 was 4.58% of \$32,000,000.00 or \$1,465,600.00, the 3.63% referring to the fixed percentage of intrastate passenger revenue excluding byproducts.

164 X Q. 129. Have you not quoted the same figures, \$1,391,902.21 all the way through, regardless of the fact that the percentages as given by you on your exhibits changed?

A. The figures upon which our exhibits are based are the assessed valuation based upon the earnings from intrastate passenger business, with its byproducts, as compared with the entire aggregate gross earnings in the State. I am under the impression that in drawing up the bill that division undoubtedly was allowed to remain undisturbed in all our exhibits, we attempting to make an actual separation of the assessed value based upon gross earnings including the intrastate revenue and the byproducts, as compared with the aggregate earnings of the State for each year.

X Q. 130. Examine your exhibit D-2 and see at the foot of that exhibit if you did not use the amount on same?

A. The amount that I have extended on the exhibit is \$1,465,600.00.

X Q. 131. But look at the last line on exhibit D-2 and see if you do not use \$1,391,902.21?

A. I used there the assessed value of the property on the basis used in the bill, based on the assessment for 1907, of \$31,000,451.45, which, multiplied by 4.49%, makes \$1,391,902.21.

X Q. 132. How much of your total expenses, freight and passenger, is divided between freight and passenger on the engine mile basis?

A. I should say it was very close to 35%. Probably some years it might run 36% and other years 34%.

165 X Q. 133. Do you mean 35% passenger?

A. No, there is a certain amount of common items which are divided on engine mileage and it runs about 35%.

X Q. 134. I will ask Mr. Hillman to propound a question or two to you which embrace so many percentages that I do not know that I understand the matter exactly.

By Mr. HILLMAN:

X Q. 134. Mr. Cox, you say that 35% or approximately 35% of your expenses have been divided between freight and passenger on the basis of engine mileage. 20% is the engine mileage which you used. And you used 16.23% for the passenger proportion of the engine mileage which you have just shown to be the percentage in West Virginia. How much would that affect the total assignment for passenger expenses in West Va.? It would be 3.77% of 35%, would it not.

A. I should say so.

X Q. 135. And that figure would be 1.32% of the total passenger expenses?

A. Yes, of which a certain proportion would be chargeable to intrastate passenger business.

X Q. 136. Certainly. Will you please make a memorandum of that 1.32% to be used a little later.

Mr. Conley, continuing.

X Q. 137. Are you conversant with the methods of making rates; that is, what elements are taken into account when rates are made?

A. No sir I am not a rate traffic man.

X Q. 138. Then you cannot say whether the cost enters into rate making?

A. I would not express an opinion on that.

X Q. 139. Have you ever been called upon to make any statement for your traffic department of the cost of carrying any particular commodity, and if so state what it was?

A. No, sir.

X Q. 140. Would any other department attempt to make up the cost of doing any particular class of business?

A. I should say not.

X Q. 141. You have however used the earnings as a basis for determining the expenses, that is, for intrastate freight and passenger expenses, have you not?

A. The exhibits which I have prepared in this case show that the freight expenses are practically sub-divided between intrastate and interstate on the basis of gross revenue.

X Q. 142. Should freight rates for intrastate be reduced one half that would, under your plan, cause a corresponding reduction in intrastate expenses, would it not?

A. If we had our total expenses and we divided it between the two classes of business, and the gross earnings for the business fluctuated the natural result would be a fluctuation.

X Q. 143. Would that be true regardless of the fact that there was not a pound of coal for fuel or any more labor used at full rates than would be used at half rates?

A. I do not comprehend that question.

X Q. 144. As an example, would it cost any more to carry a passenger when he was paying two cents per mile under the passenger rate involved in this case than when he was paying say two and one half or three cents per mile.

A. I should say that the physical cost would remain the same.

X Q. 145. I believe you stated that the operating expenses and the cost of carrying any commodity, whether freight or passenger, depends upon the rate charged.

A. I do not know that I said that.

X Q. 146. What did you say?

A. I simply stated that our freight expenses and passenger expenses had been subdivided on the assumption that the cost of earning a dollar was the same on each class of business.

X Q. 147. Well then, Mr. Cox, if the cost is not considered in rate making do you think that if you determine the cost of anything by its price, when that cost was not considered in making the price, it is a defensible proposition?

A. I stated that I did not know whether cost was considered or not.

X Q. 148. Well, my question is a hypothetical one?

A. I should say that the allotment of expenses on freight traffic on the basis of earnings would furnish some indication that the intrastate business might be more costly for handling than interstate.

X Q. 149. Mr. Cox, if the cost has been considered in making the rate do you think that the cost on which the rate was made was a proper factor to use and not the rate itself?

A. I do not know that I grasp your meaning.

X Q. 150. I will ask the reporter to read the question.
168 (Which is done.)

A. I think I will have to give that up. It is too much for me.

X Q. 151. Well, it is getting quite late and I expect we had better adjourn until tomorrow morning.

(At 6 o'clock p. m. an adjournment was taken until tomorrow, Friday morning, January 31, 1913, at 10 o'clock at same place.)

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MORNING SESSION.

Friday, January 31, 1913. The taking of depositions was resumed at 10 o'clock a. m. at the same place, pursuant to adjournment yesterday afternoon, with the same parties present.

Jos. W. COX, on the stand on cross-examination from yesterday.

By MR. CONLEY:

X Q. 152. Mr. Cox, the dividing point of the Kenova Division between West Virginia and Ohio is at Kenova, is it not?

A. In a general way I would say yes. The bridge there is included in the West Virginia mileage, and we pay taxes on it in West Virginia. But the dividing point would be a little beyond the Kenova Station. It is low water mark on the Ohio side of the River as we generally describe it.

X Q. 153. Does the line from E. Williamson to Kenova represent the West Virginia part of the Kenova Division?

A. It does.

X Q. 154. And does the line from Kenova to Portsmouth represent the Ohio part of this division?

A. It does.

X Q. 155. Please give the mileage from which you derive your 82.39% road mileage in W. Va. on the Kenova Division?

A. Are you referring to the year 1910?

X Q. 156. Yes, that is the year we were considering on yesterday.

170 A. The total mileage in West Virginia is 453.32, of which 169.69 is in West Virginia on the Kenova Division and 36.26 in Ohio, making 205.95 Kenova Division mileage.

X Q. 157. And the figures you gave us yesterday in regard to car miles and train miles as being the West Virginia portion of the Kenova Division, bearing the percentage of 82.39 of the total, were they carried over to West Virginia on the road mileage percentage?

A. The figures given yesterday would be based on the road mileage percentage.

X Q. 158. I believe however engine miles are not on the same percentage. Are they actual miles?

A. The freight engine mileage given yesterday was on the actual basis, and the passenger and mixed engine mileage on the prorata basis.

X Q. 159. Have you in the records of your Company figures which will actually show the actual car miles made and the actual train mile made in West Virginia and in Ohio on the Kenova Division?

A. I think we have.

X Q. 160. Mr. Cox, I believe on yesterday when figures were given you in certain questions I propounded for your verification that you stated the most of them were not correct as given you. Does my recollection serve me right in that respect?

A. I stated that the figures you quoted did not agree with our records and that we were going to verify them.

171 X Q. 161. The figures that you gave subsequent to those questions, each of which bore the percentage of 82.39, were corrections of the figures I gave you, were they not?

A. Well, I could not answer that, General. I would have to know what is on the record. What we have are the correct results, of course, but just to answer your question off-hand I would not like to say whether they were corrections, admissions, or what they were.

X Q. 162. What we are after are the actual figures as shown by your records. The reason why I am rather insistent on this question is because we do not believe the figures from which you got the 82.39% in car miles and train miles are correct. In other words, that they are estimated and not actual, as we understand them, and that if you take the actual miles the percentage will be as we gave it to you on yesterday.

A. I understood there was a question propounded to me as to what our records showed were the actual engine miles in West Vir-

ginia, and an inspection of our records during the night shows as follows:

Freight	\$4,252,202	
Mixed, for frt. $\frac{3}{4}$ of total mixed.....	10,319	
	<hr/>	4,262,521
Passenger	758,279	
Mixed, for psgr. $\frac{1}{4}$ of total mixed.....	3,441	
	<hr/>	761,720
Making an aggregate total in West Va....		5,024,241

of which the freight engine mileage in West Virginia represents 84.84%.

I would say, however, that in combining this mixed that I understand it is contrary to the Interstate Commerce Commission's recommendations, where they suggest in forming percentages that mixed should be added to both passenger and freight. In this calculation I have followed out the suggestion by General Conley, of distributing the mixed three-quarters to freight and one-quarter to passenger. For the balance of the system the engine, miles would be:

Freight	11,020,516
Passenger	3,310,302
Total	<hr/> 14,330,818

the percentage being 76.90 for freight and 23.10 for passenger.

X Q. 163. Mr. Coxe, can you give us the actual freight car miles on the Kenova Division, from Williamson to Kenova, which is the West Virginia portion of that division?

A. That is divided on the road mileage, and we have not the actual mileage.

X Q. 164. Do not your records show the actual mileage?

A. I should say not.

X Q. 165. I understood from the experts who examined your records for the defendant in this suit that your records did show the actual mileage, and that they are supposed to have a copy of those actual figures?

A. I have not any such records and do not know of any. Now, the experts who examined our records may have worked those figures up from some other source, but there is no tabulation of them in existence that I know of.

X Q. 166. I now hand you some statements which are alleged to show engine miles, car miles, and train miles, and will ask you to see if they are not copied from the actual figures as shown by the records of the Railway Co.

A. I will have them compared. (Which is done.) I wish to state that these have been compared with the records of the Car Record Office and we find these figures as shown on Mr. Hillman's statements are the actual mileages.

X Q. 167. Then the figures that I read into the record on yesterday and asked you to check were correct, relating to the freight car mileage from E. Williamson to Kenova, 51,103,084.

A. That is right.

X Q. 168. And from Kenova to Portsmouth O. 21,124,546?

A. That is right. These refer to freight car miles.

X Q. 169. The percentage in West Virginia being 70.75%.

A. We verified that on yesterday. That is right I see by my figures here.

X Q. 170. The figures for the passenger car miles for the same division, Williamson to Kenova, are 988,053?

A. That is right.

X Q. 171. And from Kenova to Portsmouth they are what?

A. 574,258.

X Q. 172. The percentage in West Virginia being what?

A. 63.243%.

X Q. 173. Now take the freight engine miles. Will you give the number of freight engine miles from E. Williamson to
174 Kenova?

A. 1,460,221.

X Q. 174. And from Kenova to Portsmouth it is what?

A. 578,919.

X Q. 175. And the percentage in West Virginia is what?

A. 71.61 per cent.

X Q. 176. Now give the same as to passenger engine miles, from E. Williamson to Kenova?

A. 187,197.

X Q. 177. And from Kenova to Portsmouth it is what?

A. 118,191.

X Q. 178. And the percentage in West Virginia is what?

A. 61.3%.

X Q. 179. Now have you included your mixed train miles as all passenger, and what is your passenger percentage?

A. That will have to be worked up. I can give it this way: The engine miles in West Virginia, adding to the freight three quarters of the mixed engine miles, and to passenger one quarter of the mixed engine miles, makes a percentage of 84.84% freight and 15.16% passenger.

X Q. 180. That is not what we were aiming to get. What we wish is to add to the passenger engine miles the full amount of the mixed train engine miles and then to get the percentage which accrues on the passenger engine miles to West Virginia, on the Kenova Division?

A. That is 61.95%.

X Q. 181. Will you kindly give your freight train mileage, including mixed trains as all freight, for the Kenova Division,
175 from E. Williamson to Kenova, and from Kenova to Portsmouth Ohio?

A. 70.65%.

X Q. 182. Now give the same for passenger, counting all mixed train miles as passenger.

A. 62.70%.

X Q. 183. Then, Mr. Coxe, these percentages of car, engine, and train miles, are all different from the 82.39% shown by the road mileage, are they not?

A. Yes, the road mileage would make 82.39%.

X Q. 184. Would not the same or similar discrepancies show in former years as between the track mileage in West Virginia and those factors of car miles, engine miles, and train miles, just enumerated?

A. Well, as far as I am concerned I have not used those factors in any of my calculations outside of engine miles. If similar differences had existed of course there would be corresponding differences in percentages based upon road mileage and the actual engine, train, or car miles—I say, if those differences existed.

X Q. 185. You assigned to West Virginia the expenses on the road mile basis, for the Kenova Division?

A. We have our operating expenses tabulated by operating districts, and where a district was in more than one State we subdivided those expenses on the basis of road miles.

X Q. 186. Your trainmen are paid practically on the mileage basis, are they not?

176 A. My impression is that in the coal fields some of them are paid on a day rate, but the majority of them are paid on the basis of one hundred miles minimum.

X Q. 187. Your fuel consumed is according to the mileage basis, also, is it not?

A. Yes, the fuel would be charged to each operating district, and if a district were in more than one State it would be subdivided on the basis of road miles.

X Q. 188. From the best information at hand I believe that of the total expenses of the combined Kenova and Pocahontas divisions about 40% of them accrue on the Kenova Division. Will you please confirm or correct that percentage?

A. I have not anything here showing that but could work it up. My exhibits are worked out on the entire West Virginia expenses. Of course, I could get it for the Kenova Division and make a pro rating of it.

X Q. 189. We are not asking for the West Virginia proportion but for the total expenses of those two divisions, Pocahontas and Kenova.

A. For what period?

X Q. 190. For the year 1910. Will you verify the 40% and give your answer later?

A. Yes, and while I have not those figures here now I will get them and give them to you later. (Later investigation shows this percentage to be 42.16.)

X Q. 191. For the year 1907 what percentage of the expenses did you bring over to West Virginia on the Kenova Division.

177 Look at page 12 of your direct examination.

A. That is explained on pages 12 and 13 of my direct examination. I see that I there used the following wording "simi-

larly with the Scioto Division from Williamson to Portsmouth we have 161.84 miles in West Virginia, a percentage of 80.58; and 39 miles in Ohio, representing a percentage of 19.42; so that the expenses of the lines from Williamson to Portsmouth that would be chargeable to the State of West Virginia 80.58%, and the State of Ohio 19.42%."

X Q. 192. What percentage of the expenses of the Pocahontas Division is chargeable to West Virginia?

A. The mileage, as I stated there, is Bluefield to Williamson 237.75 miles of which 7.14 miles are in Virginia, or 3.03%, and 230.61 miles in West Virginia, or 96.97%.

X Q. 193. Mr. Cox 40% of the expenses on the Kenova and Pocahontas Division are due to the Kenova Division and was charged to West Virginia on the basis of 80.58%, or 80.58% multiplied by 40% equals 32.232%. On the Pocahontas Division the remaining 60% was charged to West Virginia on the basis of 96.97%, and 96.97% multiplied by 60% equals 58.182%. If you add those two percentages together you have 90.414% as chargeable to West Virginia as the total of the Pocahontas and Kenova Divisions, have you not?

A. I could not answer that question without digesting it. We distribute the expenses of the Kenova Division on the basis of road mileage, and also distribute the expenses of the Pocahontas Division on the basis of road mileage. Now whether that proportion of the expenses from Williamson to Portsmouth was 40% of the total expense, is that the problem?

X Q. 194. We had that awhile ago.

A. Well, we have not verified that yet. That is the point though, 40%?

X Q. 195. Yes.

A. I will answer, that if the proposition as stated by the Attorney General of West Virginia is correct, that the expenses from Williamson to Portsmouth are 40% of the total expenses from Bluefield to Portsmouth, then we charge of that proportion from Williamson to Portsmouth 80.58% to West Virginia. Furthermore, on the Pocahontas Division if the line from Bluefield to Williamson represents 60% of the total expenses, we have charged up to the Pocahontas Division 96.97% of 60%.

X Q. 196. Will you give us the sum resulting from these two operations—40% of 80.58%, and 60% of 96.97%?

A. The 80.58% of 40% is 32.232%; and the 96.97% multiplied by 60% produces 58.182%. If those two percentages were added together it would make a total of 90.414%.

X Q. 197. Then of that 90.414% total expenses on the Pocahontas and Kenova divisions in West Virginia, 32.232% is on the Kenova Division, or, 35.65% of the West Virginia expenses on those two divisions is on the Kenova Division?

A. If the combined percentages—90.414%—which represent the total expenses on the Kenova and Pocahontas Divisions, are divided into 32.232%, the percentage on Kenova Division results in 35.65% of the West Virginia expenses on those two divisions being on the Kenova Division.

X Q. 198. Then the West Virginia passenger percentage on the Kenova Division as brought out in this examination, was, engine miles, 61.3%, train miles 62.7%, the average of the two percentages being 62%, is it not?

A. Yes, 62%.

X Q. 199. Please subtract this average from the 80.56%?

A. The difference is 18.56%.

X Q. 200. Then we have just calculated that 35.65% of the West Virginia charge was brought over in the road miles on the Kenova Division, and if you multiply 35.65% by the 18.56% what do you have?

A. The mathematical calculation of 18.56% multiplied 35.65% is 6.62%. I do not however admit that this has any bearing on any of the exhibits that I have filed, but am simply verifying the calculations as suggested by counsel for Defendant.

X Q. 201. If you add to the 6.62% the 1.32% noted on your memorandum yesterday at my request the result will be how much?

A. 6.62% and 1.32% makes a total of 7.94%.

X Q. 202. Had you followed the methods we have indicated here based on the actual figures instead of your 80.56% of the divisions West Virginia then your 29% engine miles would have assigned approximately 7.94% less of the total to West Virginia passenger, would you not?

189 A. That is a little deep to answer off hand.

Complainant's Exception.

Counsel for Complainant excepts to the question just propounded as well as to all questions preceding same and leading up thereto the purpose of which question was unknown to Complainant because in event the defendant desired to change the basis of ascertaining the expenses it should have made the investigation necessary as to do and have put a witness on the stand for that purpose, and that such testimony as is now adduced to prove the fact is irrelevant.

Defendant's Answer.

Counsel for Defendant replies that he is simply asking the witness to correct statements filed by him on his direct examination by the actual figures admitted by him to be correct on his cross-examination as shown by the records of the Company.

Complainant's Response.

Counsel for Complainant excepts to the question just propounded he said, states that no such figures as are attempted to be brought out in this cross-examination have been produced by the witness on behalf of the complainant. And, on the other hand, that the figures presented are figures assumed to have been ascertained by the Defendant, and Counsel for Complainant claims that they should have put a witness on the stand to prove the figures and the purpose of the introduction of any such figures, and that Defendant cannot prove its own case indirectly.

Further Study by Difficulties

QUESTIONS The following further study questions are suggested for the study of the text of the Constitution's definition of the word "State" in Article IV, Section 1, and the definition of the word "State" in Article IV, Section 2, and the definition of the word "State" in Article IV, Section 3.

§ 1. 100. How are the words "State" and "State" used in the Constitution?

§ 2. 101. How are the words "State" and "State" used in the Constitution? How are the words "State" and "State" used in the Constitution? How are the words "State" and "State" used in the Constitution?

§ 3. 102. How are the words "State" and "State" used in the Constitution? How are the words "State" and "State" used in the Constitution? How are the words "State" and "State" used in the Constitution?

Constitution's Definition

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184 A. It would have been double the amount \$930,362.50.
X Q. 216. Or, \$1,850,725.00?

A. Yes, \$1,860,725.00.

X Q. 217. If dividend number 26 had been paid at the rate of $2\frac{1}{2}\%$ on \$80,145,000.00 how much would it have made?

A. \$2,003,625.00.

X Q. 218. Dividend number 27 at the rate of $2\frac{1}{2}\%$ on \$83,820,000.00 of stock would make how much?

A. \$2,095,500.00.

X Q. 219. Dividend number 28 at $2\frac{1}{2}\%$ on \$85,240,000.00 would make how much?

A. \$2,131,000.00.

X Q. 220. Making an aggregate in dividends for the year ended June 30, 1912 of how much?

A. \$8,090,850.00.

X Q. 221. You have just stated that there was available for dividends on common stock \$8,462,006.41, and if you deduct the amount of dividends that you have just quoted \$8,090,850.00 from that amount it will leave you how much?

A. \$371,156.41. I want to state that such a proceeding on the part of any railroad company would be decidedly unbusiness like, and it is not probable that they would ever declare a dividend of 10% when by so doing they would make no provision out of income for additions and betterments; or appropriation for discount on securities sold, or anything of that kind. To simply make the bare statement that they could declare that much in dividends I hardly think a proper one because no railroad would do it, or certainly no conservatively managed railroad would do it.

X Q. 222. After declaring such dividends you would have \$371,156.41 surplus?

A. Yes, but with no provision for additions and betterments, which must be paid for out of income.

X Q. 223. Are you aware, Mr. Coxe, that the Supreme Court of the State of West Virginia has declared that in arriving at the legality of a rate fixed by the legislature you must treat the purchase of additional equipment and extension of lines and other improvements as a part of the net earnings; the decision being in the case of the Coal & Coke Ry. Co. against Conley and others?

A. No, sir I cannot say that I was aware of that.

X Q. 224. Then, Mr. Coxe, these dividends aggregating 10% for the year ended June 30, 1912 could have been declared notwithstanding the fact that the Railway Co. has increased its common stock since the institution of this suit several millions of dollars? In other words, in arriving at the dividend of 10% you included in the amount of stock on which it could have been declared the increase in the common stock, did you not?

A. I took the common stock as it stood at the time of each declaration of dividends.

X Q. 225. Will you please tell me how much the common stock the Norfolk & Western Ry. Co. has been increased since the institution of this suit?

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Complainant's Exception.

Counsel for the Complainant excepts to the question because irrelevant, having no relation to any of the issues in this case.

A. This bill I presume would be the governing date. It seems to have been filed, approximately, June 1st 1909.

X Q. 226. That will be near enough for the purposes of my question.

A. The common stock outstanding on June 30, 1912, was \$85,-653,000.00, and as of June 10, 1909, the common stock was \$66,-000,000.00, being an increase of \$19,653,000.00.

X Q. 227. During that period has there been any increase in the preferred stock.

A. No sir the preferred stock has remained stationary.

X Q. 228. I will ask you to state the average fare per passenger per mile over your entire system for the year ended June 30, 1911, and also for the year ended June 30, 1912.

A. The average rate of revenue per passenger per mile on the entire Norfolk & Western System for the year ended June 30, 1911 was 2.16 cents. The average revenue per passenger per mile on entire Norfolk & Western system for the year ended June 30, 1912 was 2.142 cents.

X Q. 229. Do you sell two cent mileage books for your system good in West Virginia?

A. The local mileage books are good in West Virginia.

X Q. 230. Which are sold at the rate of two cents per mile?

A. Yes, sir, 2 cents, sold in books of a 1000 miles each at \$20.00.

187 X Q. 231. What rate per passenger per mile with ordinary baggage are you now charging for intrastate passengers in West Virginia?

A. Two and one half cents.

X Q. 232. That is all I believe.

(And a recess is taken at 1 o'clock until 2:30 p. m.)

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Afternoon Session.

FRIDAY, January 31st, 1913.

The taking of depositions was resumed at 2:30 p. m., pursuant to recess, at same place and with the same parties present as noted on yesterday.

JOS. W. COXE—A witness for Complainant, heretofore on the stand and examined in chief and cross-examined, is re-examined as follows:

By Mr. COCKE:

R. Q. 1. Mr. Cox, during the course of your cross-examination you were asked quite a number of questions to the effect that in your

examination-in-chief you had used a fixed capital for three years—\$1,391,902.31—the operations of which years were used in the bills filed in this case, said amount being used for all three years as the amount of capital to be appropriated to the doing of intrastate passenger business in West Virginia. Will you please explain why you in your testimony in chief used the same amount of capital for each one of those years although the amount of earnings upon which you based your capital was different during the three years under investigation?

A. My testimony during the original or first hearing in this matter was largely based upon the bill which had been drawn by, I think Mr. Reath, and was based upon the transportation of passengers exclusively, and the total assessed value of property in the State of West Virginia being divided on the basis of the earnings, resulted in the capital of \$1,391,902.31 appearing on my exhibit 189 and in the bill as based upon the revenue from passengers only. In drawing up the figures for the subsequent year, as a matter of convenience, it was simply assumed that the capital remained the same, it being known that the assessment was certainly no less than it had been in previous years, and the valuation being based upon the tax assessment was contained in that way from year to year?

R. Q. 2. The amount of earnings during the years 1908 and 1909 from the intrastate passenger business did not make the capital involved when distributed on the basis of earnings any less than the amount that you had ascertained to be the capital for the year 1907 and which you used as a minimum basis. Is that right?

A. That is not correct, for the reason that in the bill the same capital on intrastate passenger traffic, excluding byproducts, was used for the years 1907, 1908 and 1909.

R. Q. 3. However, the exhibits which you filed during the course of your examination-in-chief, were they based upon the revenue from the passenger business alone, or were those exhibits based upon the revenue received from passengers on passenger trains, not only from the fares of the passengers but also from what is commonly called byproducts incident to passenger business, such as mail, express, and excess baggage?

A. The exhibits which I prepared and filed in the case showed both the returns from passengers exclusively, and also revenue from passengers including what western byproducts, in the way of excess baggage, mail, express, and other miscellaneous train earnings. In dividing the capital on this combined revenue for passengers 190 and miscellaneous revenue, and the division being based on gross earnings, the capital being distributed to each class of business according to the gross earnings of that class of business, it naturally varied from year to year, but, as before stated, in the bill Mr. Reath, who drew up the bill, simply used the capital of \$1,391,902.21 as a matter of convenience, feeling that the capital was certainly no less than it had been before, and in order to avoid any question of method of division we simply continued the same capital from year to year to prove the bill.

R. Q. 4. As I understand the subsequent exhibits that you filed as a part of your testimony showed the capital for these respective years varied according to the percentage of intrastate passenger business as compared with the entire business of the Company to which this capital was allotted.

A. That is a fact.

R. Q. 5. If you have convenient a summary of the results of your testimony and exhibits in connection with the business of the Company for the years 1907, 1908, and 1909, in which the results based upon the revenue from passengers only and also based upon revenue from passengers including the revenue from byproducts are shown I will be glad if you will file such exhibits for convenient reference hereafter.

A. I file such exhibits, marked Exhibit J-1, embracing the figures already included in Exhibits D-2, C-2, and B-2 for the years ending June 30, 1907, 1908, 1909 respectively, which shows a return on the passenger business exclusively, that is from the transportation of passengers exclusively, of 3.73% and including byproducts 191 of 3.84%. This is, for the year ended June 30, 1907, being the year when the 3 cent rate prevailed up to May 31, 1907. For the year ended June 30, 1908, I show a rate of return on the capital based upon the allotment of the tax assessment on the transportation of passengers exclusively of 1.04%, and including byproducts of 1.19%. For the year 1909, when the 2 cent rate was in effect the entire year, there was no revenue left for application to the capital, which, in the case of revenue from the passenger business including byproducts, was \$1,465,600.00 in which there was a deficit of total income applicable to capital of \$616.11.

R. Q. 6. In ascertaining the amount of expenses incurred in doing the passenger and freight business of the Norfolk & Western Ry. you have heretofore testified, as I understand it that for all practical purposes 65% of those expenses are divisible by actual physical separation of the items of expense which appropriated themselves to the two branches of business, and of the remaining 35% of those expenses you divide and appropriate on the basis of the respective engine mileage of the two classes of business. You have also testified that the result of a number of years experience on the Norfolk & Western Ry. has shown that *that* engine mileage of the two branches of the business is respectively 80% and 20%; that is to say, 80% of your engine mileage is freight engine mileage, and 20% of your entire engine mileage is passenger mileage. You have been cross examined on this basis of division of expenses with the implied criticism that it is inaccurate and improper as a mode of division, 192 and it has been suggested that the actual engine mileage be ascertained for the purpose of dividing the expenses in this case. Will you please state how it was that the ratio which you have adopted came about, and whether or not in your judgment it is a proper and substantial mode of dividing these unallocated expenses?

A. I would state in reply to that question, which is a somewhat general inquiry, that I do not think the accuracy of the freight and

passenger mileage of the system was questioned, but the freight and passenger engine mileage in West Virginia.

R. Q. 7. Yes, that is right.

A. As I stated, I think on yesterday, it is very essential in practical accounting to have per cents which will apply themselves to ready application in making divisions, provided facts will sustain them generally, and it has been the practice on the Norfolk & Western Ry. for several years back to use this division of 20% for passenger and 80% for freight, feeling that it was a fair and closely approximate separation of the expenses. I think in some years it would not run actually 20% and 80% but would be sufficiently close to those percentages to justify that application.

R. Q. 8. You have considered from time to time and in the various investigations that you have made with regard to rate cases, the other grounds of division of these expenses which have been suggested, namely, car miles, tonnage miles, and engine miles, and I will be glad now for you to state whether or not under all of
193 the circumstances which have been considered in ascertaining a reasonable division it is still your judgment that the division on the basis of engine miles more nearly approximates a correct division than any of the other divisions which have been suggested. Of course, I mean taking it as a whole.

A. I have from time to time investigated the theories of division and while a majority of them have certain features of merit, and show a somewhat greater refinement of the basis of division, I realize that no fixed plan could be generally adopted but must necessarily vary according to the circumstances connected with each railroad. I believe on the Pennsylvania R. R. I might prefer train miles to engine miles, but with the Norfolk & Western Ry. where we formerly used train miles, my purpose was to get a division that would be practical and at the same time fairly accurate. I was desirous of treating the passenger business as favorably as the circumstances would permit, with fairness to both classes of traffic, and the Norfolk & Western Ry. being largely a mountain road, crossing two chains of mountains, and especially in the western section running through a rugged country, with numerous curves, more or less grades, and necessitating what we term double-headers on a majority of the freight trains, I felt that for the Norfolk & Western Ry. as a whole the engine miles would be preferable to train miles.

R. Q. 9. Will you give the percentage of actual engine miles in West Virginia divided between freight engine and passenger engine mileage, for the three years 1907, 1908, 1909, for which
194 years you furnished a statement of the business of the Company.

A. For the year 1906-7 the percentage of engine mileage in the State of West Virginia was as follows: Passenger, 17.2%; freight, 82.8%. For 1907-8 the percentage in West Virginia is 19.72 for passenger and 80.28 for freight. For the year 1908-9 the percentage was 18.76 for passenger and 81.24 for freight.

R. Q. 10. Mr. Cox, in your cross-examination, as I have stated before, you were criticised for using your ratio of 20% for passenger

and 80% for freight in dividing the expenses, that being the relative freight and passenger engine mileage upon which your calculation was based. I now ask whether or not you have made up an exhibit for the year ended June 30, 1909, the last year the accounts of which you dissect and furnished exhibits for, on the basis of the actual passenger mileage for that year in West Virginia; and if so, I would be glad that you would file such exhibit, and state briefly the result of the division on the basis of the actual mileage in West Virginia for that year.

A. I file such exhibit and ask that it be marked "Exhibit K-1." In preparing our data for the exhibit D-2, filed with the original testimony of this case, the engine miles of the system, passenger and freight, were used on the basis of distributing as we term common items as between passenger and freight. When the point was raised that it might have been better to have applied the engine mileage in West Virginia instead of the engine mileage of the system, I was interested to see what the result would be if we followed the plan generally outlined by the defense, assuming that 35% of the total expenses in the State for any items upon which the 20% and 80% had been applied, should be used. I therefore took from my exhibit D-2 the total expenses in the State, passenger and freight, of \$4,921,368.50, and eliminated therefrom 35% or \$1,722,478.98, of which \$344,495.80 was passenger, and \$1,377,983.18 freight, and then added back this same amount \$1,722,478.98, on what it would have been had the local West Virginia engine mileage been applied instead of the system mileage. I then subdivided these revised results between passenger and freight expenses on the basis of earnings, and the result is I show the operating expenses for intrastate passenger business \$335,576.42, with taxes \$12,413.87, making an aggregate sum for operating expenses and taxes of \$347,990.29, which I divided by the intrastate passenger revenue, and produced a percentage of 97.88. This is on the passenger traffic. This revision slightly changes the intrastate freight as well as passenger, and on the freight the percentage is 63.54%, and on the combined passenger and freight 87.03%. Adding to this the 23% figured by Mr. Hillman as the proportion of gross earnings consumed in the payment of interest, dividends, etc., we would have a total of 110% of cost on the intrastate passenger and freight traffic.

R. Q. 11. My understanding is that you have not prepared any similar exhibits covering the years 1907 and 1908, but I will ask you whether or not viewing the actual passenger engine mileage for those years, which you have testified to, and applying it to the situation as shown in your exhibit for 1907-8, the use of the new factor for division of passenger and freight engine mileage would to any substantial degree change the results of the exhibits you have heretofore filed for 1907-8?

A. The engine mileage for 1907-8 is practically 20% and 80% in West Virginia; that is, 19.72% for passenger and 80.28% for freight, so that there would be very little difference for that year.

In 1906-7 there would be some difference from the fact that the passenger mileage is 17.02% where we use 20%. It is more accentuated in 1906-7 than in 1907-8, but in neither case would it be sufficient to change the issue as shown in my exhibits.

R. Q. 12. Mr. Coxe, you have heretofore testified in this case, and your testimony heretofore has been entirely confined to giving the results of your study as to the revenue from your intrastate passenger business, as well as an endeavor to ascertain the cost at which that revenue was earned. Since you testified in chief Mr. Hillman, an expert witness for the State of West Virginia, has testified and shown as a result of his study and investigation, that practically the entire revenue derived from intrastate passenger business in West Virginia was consumed in the expenses necessary to earn that revenue, together with taxes. Later however an attempt has been made by the State of West Virginia to show that the entire revenue from Intrastate passenger and freight business was
197 sufficient to justify the reduced passenger rate without depriving the capital invested in both classes of business of a return thereon. I now desire to ask you some questions with reference to the character of the Intrastate freight business in West Virginia, and for this purpose I ask you first what are the elements which make one class of freight business more costly than another class?

A. The factor whether it was package or car load freight; whether it was freight which had a long haul or a short haul; whether it was freight which traveled from point of origin to its terminus on the main line, or whether it was interchanged between main line points and various points on branch lines, or whether it was branch line tonnage going from one branch line over the main line to another branch line.

R. Q. 13. Will you please state what is the great preponderating class of freight in West Virginia.

A. The great tonnage in West Virginia is coal and coke.

R. Q. 14. That moves, to all intents and purposes, in Interstate Commerce?

A. Yes, sir; almost exclusively. There is a little intrastate coal business but no intrastate coke business.

R. Q. 15. Of the entire tonnage of freight in West Virginia what is the percentage of it that is coal and coke and which you say moves in Interstate Commerce entirely?

A. I have no such percentage on this statement, if you want to bring it out on this exhibit, but I can illustrate the relative proportion by reference to the month of May 1910, because I was
198 handling that month in connection with the exhibit which Mr. Hillman had prepared, which was numbered 5, and was based upon the month of November 1909, and the month of May 1910. I notice in the memoranda I have there that on the entire tonnage mileage from Bluefield to Williamson in the month of May 1910 the coal and coke represented 83%; that is, the entire movement of tonnage mileage coal and coke represented that amount.

R. Q. 16. Under what condition does that coal and coke move, from a standpoint of expense? Does it move in train loads and are the operating conditions favorable to the movement at the least expense?

A. I should say that the coal and coke business as a whole was an extremely homogeneous traffic, enabling most favorable results with the least cost consistent with the situation.

R. Q. 17. As a matter of fact the movement of your coal and coke has been the subject of investigation by public authority?

A. It has.

R. Q. 18. Was it recognized that it was moved at the least price and hence at the least cost of any traffic in this country?

A. I believe in the investigation of the Lake Coal Case it was shown that the rate per ton per mile on the Lake Coal was about the least rate of any compensation received for any commodity in this country, and that it could only be carried at that low rate under the very best possible conditions that the transportation of the commodity affords.

R. Q. 19. What is your mileage in West Virginia?

A. The total miles of road in West Virginia is 453.32 as of June 30, 1910, which was also the year in which Mr. Hillman made his experiment on his table, exhibit number 5, etc.

R. Q. 20. How much of that is branch line and how much main line mileage?

A. The main line mileage in West Virginia is 240.76 and branch lines 212.56, making the total of 453.32 miles. The main line is 53.11% and the branch lines 46.89%. Embraced in this mileage is the line west of Bluefield and to Williamson where the main line is 103.46 miles and the branch lines, 140.27 miles, a total of 243.73 miles, of which the branch lines represent 57.65% and the main lines 42.45%. On the line between Williamson and Kenova the main line is 28.29 miles and the branch line 71.40 miles, a total of 169.69 miles. The percentage of branch lines being 42.08% and the main line mileage being 57.92%.

R. Q. 21. Will you please state whether or not the expense of doing business on branch lines is more or less than the expense of doing business on main lines?

A. I would say as a general proposition it is far more expensive to do business on branch lines than it is on main lines.

R. Q. 22. If you have the amount of merchandise business—and in saying merchandise business I mean the business of the Norfolk & Western Ry. in West Virginia outside of its coal and coke business, interstate and intrastate, for the month of May, 1910, which is the month selected by Mr. Hillman for his analysis, I would ask you to please give it.

A. I would state that I have before me an approximate statement showing the relative proportion of intrastate and interstate freight traffic interchanged with branch lines, Bluefield to Williamson, during the month of May, 1910, which I made up when studying Mr. Hillman's Exhibit #5. The statement, as I say, is approximate because it necessitated going over the waybills and received reports,

and I have given it in pounds, so that it will not in every case actually check out to tons, although it is close to it. For that reason I speak of it as an approximate statement of intrastate freight traffic for the month of May, 1910, on the main line between Bluefield and Williamson, and it consisted of 95 cares of coal with an aggregate tonnage of 8,215,000 lbs., as compared with interstate coal of 2,778,012,000 pounds.

R. Q. 23: The movement of intrastate coal and coke as compared with interstate coal and coke is almost negligible, is it not?

A. Yes, sir; being 8,000,000 pounds as compared with 2,800,000,000 pounds in round numbers.

R. Q. 24. Now give the statement with reference to merchandise or commodities other than coal and coke.

A. The merchandise traffic, carload, intrastate business, consisted of 362 consignments, weight 15,000,000 lbs. The less than
201 car load consisted of 3258 consignments of an aggregate weight of 2,412,000 lbs. So that of the total number of consignments in the intrastate traffic, in which I have embraced coal on account of it being a limited item, the less than car load shipments represented over 87% of the entire movement of intrastate merchandise. Of the merchandise traffic, excluding coal and coke the intrastate represented a total weight of 17,422,624 pounds, of which there was interchanged with branch lines 57% whereas with the merchandise traffic, excluding coal and coke, in interstate movement, the tonnage interchanged with branch lines represented 5%. Of the entire intrastate merchandise, of 17,422,624 pounds, the less than car load shipments represented 14%, whereas with the interstate movement the less than car loads represented 2%. This is accounted for I think very largely in the merchandise by the fact that in interstate traffic on the Kenova Division there was a large movement, amounting to 317,000,000 pounds which originated and terminated east or west of Williamson, representing fast freight line traffic from the Steamers at Norfolk going west, and the traffic going east which comes from the northeast and goes to the south and southeast, in the way of grain and grain products meats and general produce business.

R. Q. 25. As I understand you, Mr. Coxe, as you have previously stated, the cost of doing any particular business, or the excess cost of doing a portion of the business as far as freight cost is concerned, does not arise from the fact that the merchandise or articles carried
202 were carried in interstate or intrastate business, but arises from the fact of whether it is handled locally or carried for long distance in what is known as through freight. Am I correct?

A. I think that would be a pretty clear synopsis of the matter. We all know that as far as local business is concerned it is more expensive than through business without defining it as interstate or intrastate.

R. Q. 26. As the result of your investigation in the month of May, which Mr. Hillman uses as his basis for ascertaining costs, does it carry home to your mind that the intrastate freight is carried

under local conditions at a vastly greater expense than interstate freight.

A. Yes, sir, I think this is true, that this statement would indicate that.

R. Q. 27. Does the same investigation show that intrastate freight is carried to a greater percentage under branch line cost as compared to main line cost in comparing this cost with the cost of doing interstate freight business.

A. The percentage of intrastate freight business interchanged with branch lines is vastly in excess of the corresponding percentage of interstate, and I think accounts for the largely increased cost.

R. Q. 28. Mr. Coxe, in your cross examination this morning you were requested to give certain figures and information for the year 1910, and especially the month of May 1910, which was the month used by Mr. Hillman in his calculation. I want to ask you whether or not that year 1910 was a fair average of the year's operations of the railroad from a financial standpoint up to that time?

203 A. The year 1910 was somewhat, you might say, a banner year, being about the best year from 1906 to 1910 inclusive in the way of net results.

R. Q. 29. Would it be fair in your judgment to take the results of the year 1910 as a basis upon which to pass on any rate question in which the railroad Company was involved.

A. I believe it would be a fairer proposition to work up a statement of that kind somewhat on the order of the Interstate Commerce Commission statement, where they seem to take a series of 5 or even 10 years. I believe in this case it would have been fairer to have taken a period from 1906 to 1910, than to take one year itself.

R. Q. 30. The Attorney General in his question this morning asked something about the revenues of this Company for 1911 and 1912, especially the year ended June 30, 1912, in which it appeared that the gross revenues of the Company had exceeded the year before, or the year 1910, by \$4,000,000. I will be glad if you will state what is the result to the Company in the year 1912 as compared with the year 1910 in net revenue.

A. The business of the Company in 1912 was a large traffic, keeping pace with the investment of capital, which had increased considerably in those two years, and showing a total operating revenue for the year ended June 30, 1912, of \$39,735,237.05, as compared with year 1910 of \$35,053,870.42, an increase in transportation revenue of \$4,681,366.63, this increase being about 13%.

204 On the other hand the operating expenses for 1912 were \$25,659,439.87, as compared with operating expenses for the year 1910, of \$21,046,359.69, an increase of 22%. So that for the two years the net earnings were almost identical in spite of the fact that the gross earnings for 1912 had increased over 1910 by \$4,000,000.00, indicating that the expenses increased at a greater percentage than the gross earnings.

R. Q. 31. In other words, for the year 1912 you did four million dollars of business over and above the business of 1910, but out of

which business you received no additional net profit over the profit that was received in 1910 derived from \$4,000,000 less business?

A. 31. That is right.

R. Q. 32. What was this condition due to?

A. Due to the general increase in cost during that period, especially in the question of labor, which is perennial in its demands.

R. Q. 33. That increased cost still continues, does it not?

A. It seems to be an endless procession.

R. Q. 34. Is it, or is it not a fact that the cost of labor has increased since the end of the fiscal year 1912?

A. Yes, sir; there have been recent demands for additional rates of pay, and I think only recently conferences have been held on the subject.

R. Q. 35. What was the result of the conference?

A. As a rule they meet the demands of the labor organizations.

R. Q. 36. That is all in the way of re-direct examination on your cross examination.

Recross-examination.

By Mr. CONLEY:

R. X Q. 1. Mr. Cox, will you file as a part of your deposition page 7, and the top of page 8 down to the words "Capital Stock" of your printed annual report for the year ended June 30, 1911, and mark the same "Exhibit J. W. C. No. 7?"

A. I will.

R. X Q. 2. Will you also file with aa a part of your deposition and mark it "J. W. C. No. 8," printed pages 8 and 9 of the annual report for the year ended June 30, 1912?

A. I will arrange to file such exhibit and mark the same accordingly.

R. X Q. 3. Mr. Cox, in referring to Exhibit No. J-1, just filed by you under the head of Revenue for Passengers only for the year 1907, 1908 and 1909, I note you have used the same figures for each year under this heading as the apportionment of the valuation of the railway company to West Virginia on which you base your calculation for Passenger Revenue. Will you tell me why you used the \$1,391,902.31 for each of these years?

A. I have no especial reason other than to meet the desire of our legal department. As I recall it was at the suggestion of our
206 General Solicitor, that having determined the capital for the first year, he would simply use it, as per the basis of his bill, for the other years on the ground that the capital would probably not be any less, and might probably increase, and it would simply be a method of avoiding any complications or discussions as to a fluctuation of capital.

R. X Q. 4. It seems that you base your calculations upon the percentage of earnings and expenses. Why do you not change this capitalization?

A. In each of these exhibits you will find that where I bring in

by-products and miscellaneous income that I do fluctuate the capital with the earnings, my idea being that the division or distribution of capital would be on the basis of earnings.

R. X Q. 5. I am speaking of valuation under the revenue from passengers only. What inherent virtue have the figures used there for the year 1907?

A. In that year the assessed value, as I recall it, was divided and the percentage proportioned which the earnings from purely passengers bore to the entire earnings in the state, and that was applied to the assessed value to get the proportion accruing to the year 1907.

R. X Q. 6. What inherent virtue has the per cent in the year 1907 that made it a correct criterion in your subsequent calculation as to the value of the property allotted to passenger business in West Virginia?

A. I can only say, as I have stated before, that that value 207 was the value fixed in 1907, and our General Solicitor in getting up his bill, took the position that it would simplify the situation to consider the capital at least as remaining as it was, although it would naturally increase; that the capital would be no less but might be more.

R. X Q. 7. Suppose you had started your computation with 1908 or with 1909, what per cent would you have used?

A. I presume if I had made it up on the plan as suggested by our legal department I would have adopted the same general rule that I did in 1907.

R. X Q. 8. Then you would have a different value depending upon the year of commencement and would carry it through the following years indefinitely?

A. If you divided it invariably on the earnings the capital would likely fluctuate from year to year.

R. X Q. 9. Did you not start, Mr. Cox, with the year 1907, on the earnings basis and then fail to change it when the basis of earnings changed for the years 1908 and 1909?

A. We simply continued the same valuation all the way through.

R. X Q. 10. Notwithstanding the fact that the earnings were different?

A. Yes, sir, notwithstanding the earnings were different.

Q. Well, I will ask you again, what particular value or virtue has the year 1907 over other years?

208 A. I will answer again that simply 1907 shows that we got one return, in 1908 we got a different return. In 1907 the three cent rate was in effect and in 1908 and 1909, as I recall it, or of all of 1909 certainly, a different rate was in effect.

R. X Q. 12. Your percentage was down in 1908 and 1909, and you kept your capitalization the same. If you were basing your capitalization on percentage earnings, why did you not reduce your capitalization?

A. Well, simply on the ground, as I have said, taken by Mr. Reath, our General Solicitor, that we would avoid any question if the capital remained the same.

R. X Q. 13. Mr. Coxe, is it not a fact that the capitalization should never be based upon earnings?

A. I should say that in the division of capital the earning basis has been generally adopted.

R. X Q. 14. Mr. Coxe, you said a while ago on redirect examination that it is essential in practical accounting to have an easily used percentage provided the facts will sustain it generally?

A. Yes.

R. X Q. 15. Then all rate cases are to be dependent on the road's convenience in the use of percentages, is it?

A. No, what I meant to say was, that if that percentage had been 75 and 25 or 76 and 24 I would not have felt I was exactly in the realm of reason to use 20 per cent. and eighty per cent., but where I got, say, 19 or 18 per cent. I would not be without the realm of reason to use 20 per cent.

209 R. X Q. 16. How would it be if it were 84 and 16 per cent?

A. 84 and 16 I think would be probably a little extreme as compared with 80 and 20.

R. X Q. 17. Mr. Coxe, you stated also on your redirect examination awhile ago, that, in your judgment the engine mileage is a better factor than either car or train mileage for the division between freight and passenger?

A. I do not think I made reference to car mileage. I may have stated that I considered engine mileage a better percentage in the case of the Norfolk & Western than train miles on account of the character of our country through which we run, so much of our freight being double headers.

R. X Q. 18. My recollection is, Mr. Coxe, that the question did not refer to train miles, but did refer to both car and engine miles.

A. Well, I may have misunderstood it, but my reply would be the same, that I consider engine miles that we use the better factor.

R. X Q. 19. Has not the Interstate Commerce Commission divided the primary accounts of railway companies into 116 in number?

A. That is my recollection.

R. X Q. Then why is the engine mileage a better basis for each of those separate primary accounts, where they are joint, than the factor which bears directly on each of those 116 primary
210 accounts?

A. Well, I figure that the engine is a fair unit of expense of operation in the way of cost and the resulting earnings from those mileages of engines; and while there may be a greater or less degree of refinement in going into detail I believe in general results that the engine mile is a closer approximate determination of the separation, and that the unit is one which is easily arrived at.

R. X Q. 21. Then you use that factor because it is the easiest?

A. Not alone because it is the easiest, but because I believe it is a satisfactory general result.

R. X Q. 22. Mr. Coxe, in referring to the passenger engine mile percentages, and the particular engine mile percentages for the year 1907, you gave for passengers 17.2 per cent. and freight 82.8 per

cent; for the year 1908, passenger 19.72 per cent. and freight 80.28 per cent; and for the year 1909, passenger 18.76 and freight 81.24 per cent. How did you bring over to the Kenova division the situation to make the above figures?

A. That was the actual engine mileage on the Kenova district.

R. X Q. 23. Did you apportion the Shenandoah and Radford Divisions on the same basis?

A. Well, the Shenandoah and Radford Divisions were apportioned whereas the Kenova division was the actual result.

R. X Q. 24. On what basis are — prorated?

A. The Kenova Division was actual engine mileage, but on the Shenandoah and Pocahontas divisions it was pro rated.

R. X Q. 25. Based on what?

A. Based on the miles of road of the division in each state.

R. X Q. 26. And the same is true of the Pocahontas and Radford divisions?

A. Yes, sir.

R. X Q. 27. How is it, Mr. Cox, that for passenger it drops from 18.78 in 1909 to 16.23 per cent in 1910, as we checked with you yesterday?

A. I can only reply to that in a general way on the assumption that in the expenditure of capital freight traffic was probably developed a little more rapidly than passenger business. That is just a general assumption. I have not gone into it, but I say that might account for that fluctuation.

R. X Q. 28. You said a while ago that the expense of doing business on branch lines is far greater than for doing business on the main line. Can you give the figures?

A. No, sir. Just in a general way I say I know that. We keep no statement of expenses of individual branch lines, and my remarks in that particular were simply from the general belief that the operation of branch lines is naturally more expensive—doing more or less package business, you have got to run your trains, and yet you are not getting the full benefit of them; you have to have your cars and train crews for the business anyhow, whether it is there or not. It is different perhaps from main line business where you are using all of your equipment in the way of engines and cars and getting better results.

R. X Q. 29. But you can not give us any figures on that?

A. I have no figures for any branch line operation.

R. X Q. 30. I believe you stated that your lake coal rates were exceedingly low, in fact, the lowest of any road in the country. Is that correct?

A. The amount received by us for the transportation of lake coal I think is generally conceded to be one of the lowest rates in existence.

R. X Q. 31. How is your coal rate for other shipments interstate; or for instance, to the Eastern Seaboard?

A. To the Eastern Seaboard I should say it was what you might term a low rate.

R. X Q. 32. How about your coal rate for intra-state West Virginia shipments?

A. Those are naturally fairly high rate.

R. X Q. 33. Can you give them?

A. I have not the rates at hand now. I can furnish the data later if desired.

R. X Q. 34. They are much higher than the inter-state rate?

A. Naturally they are much higher rates.

213 R. X Q. 35. You stated on your redirect examination that 57 per cent of the pounds of intra-state freight were interchanged between branch and main lines. Will you tell me how much was on the branch lines, and how much was on the main line?

A. The car-load traffic from branch lines to branch lines via the main line, that is where the business originated on a branch line and goes to the main line and comes back on a branch line—was 830,030 pounds, and less than car-load was 41,520 pounds.

R. X Q. 35. Are you able to give us now how much of this interchange freight accrued on the branch lines and how much accrued on the main line, expressed in pound miles?

A. I have not that information.

R. X Q. 36. Are you also unable to give the same information as to the inter-state business?

A. I only have the data here in pounds and not in pound miles.

R. X Q. 37. Have you included in your branch line movement of coal the concentrating cost and mileage?

A. I have not.

R. X Q. 38. That is all.

Signature waived by agreement of counsel.

GEO. L. HART,
Notary Public.

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Complainant's Rebuttal Evidence.

The Complainant introduces Joseph W. Coxe as a witness for the purpose of interrogating him in rebuttal on the exhibits filed by C. W. Hillman, an expert witness introduced and examined on behalf of the defendant, the State of West Virginia.

JOSEPH W. COXE, for Complainant, in Rebuttal.

Direct examination.

By Mr. COCKE:

D. Q. 1. Mr. Coxe, I will be glad if you will turn to Mr. Hillman's exhibit No. 6. In this exhibit I understand that he undertook to find out how much of the revenues which are derived from intrastate passenger business in West Virginia are consumed in expenses and taxes. I think the result of his conclusion is that 97.4203 per cent of those earnings are consumed in paying taxes and expenses incident to earning the revenue. In the analysis of Mr. Hillman's

exhibit it appears that he puts in excess baggage, mail and express as a part of the revenue derived from the passenger business, and undertakes to divide that revenue between inter-state and intra-state on the basis of the expenses of doing the respective classes of business. I will be glad if you would state whether or not in your judgment the basis of division used by Mr. Hillman for this purpose is
215 the correct basis of division, and if it is not, please state what in your judgment is the correct basis for a division of the revenue derived from these byproducts.

A. Mr. Hillman's exhibit No. 6 is based upon the earnings of the line between Bluefield and Kenova for the months of November, 1909, and May, 1910, and he embraces as a part of the passenger earnings for the line between Bluefield and Williamson excess baggage, mail, and express, and other passenger train earnings, aggregating for these two months \$17,764.06, of which he allots to the line in West Virginia a percentage proportion based on mileage of 94.4%, or \$16,769.27, and attributes to the intrastate passenger traffic 52.9204%, or \$8,875.87. On the line from Williamson to Kenova he similarly takes this same class of earnings, aggregating \$8,246.21, and gives to the line in West Virginia 58.8344%, or \$4,851.61.

The items objected to in this exhibit are the allotments of other passenger train revenue as distributed by Mr. Hillman on the basis of intrastate and interstate passenger expenses. Reference to Mr. Hillman's exhibit No. 3 shows the total passenger expenses for the Pocahontas District for November, 1909, and May, 1910, as \$73,390.42; and Mr. Hillman's exhibit No. 4 shows intrastate passenger expenses as being \$38,845.10, the \$38,845.10 being used as the numerator, and \$73,390.42 as the denominator, pro-
216 duces an expense per centage of 52.9294 per cent.

Mr. Hillman accordingly takes the items of "Other Passenger Train Revenue" on the Pocahontas district for November, 1909, and May, 1910, aggregating \$17,764.06, of which 94.4% represents the mileage of the line Bluefield to Williamson, W. Va., and produces \$16,769.27.

Of this last named amount of \$16,769.27, Mr. Hillman allots to intra-state passenger earnings 52.9294 per cent, as shown above and produces as the intra-state allotment of other passenger train revenue on the Pocahontas district, \$8,875.87.

Similarly on the Kenova district, Williamson to Kenova, Mr. Hillman takes the other items of passenger train revenue, aggregating for the months of November, 1909, and May, 1910, \$8,246.21. Mr. Hillman subdivides this amount, \$8,246.21, between intra-state and inter-state on the basis of passenger operating expenses as shown in his exhibit No. 3. Total passenger operating expenses, Kenova to Williamson, \$32,395.57. Intra-state passenger expenses, as per Mr. Hillman's exhibit No. 4, \$19,059.72, or 58.8344 per cent. \$8,246.21 multiplied by 58.8344 per cent produces the proportion credited by Mr. Hillman to intra-state passenger earnings, Williamson to Kenova, \$4,851.61.

So that the total intra-state "Other Items of Passenger train

earnings" as used by Mr. Hillman are, for the Pocahontas district, \$8,875.87, and for the Kenova district \$4,851.61, a total of \$13,727.48. The method adopted by Mr. Hillman of distributing the "Other Items of Passenger Train Revenue" on the basis of expenses is objected to, and the suggestion made that the more appropriate method of distribution is on basis of intra-state passenger revenue and inter-state passenger revenue. Mr. Hillman's exhibit No. 4-A shows all passenger revenue (passenger only) for the Pocahontas district for November, 1909, \$31,805.91, for the Kenova district \$15,664.68; and for May, 1910, Pocahontas district, \$37,677.45, and Kenova district \$17,042.64, and aggregate for the Pocahontas district for November and May of \$69,483.36, and for the Kenova district for November and May, \$32,707.32. Whereas the intra-state passenger revenues (passenger only) for November, 1909, and May, 1910, Pocahontas district were \$31,109.86, so that percentage of intra-state passenger revenue on Pocahontas district to the total passenger earnings from the transportation of passengers exclusively is 44.7 per cent, and on the Kenova district the intra-passenger revenue, November, 1909, and May, 1910, was \$17,285.91, or percentage of intra-state revenue 52.85.

Therefore the proportion of "Other Items of Passenger Train Revenue for November, 1909, and May, 1910," to be credited to intra-state passenger earnings, should be Pocahontas district \$16,769.27 multiplied by 44.7 per cent, which would produce \$7,507.60; and on the Kenova district \$8,246.21 multiplied by 52.85 per cent, which would produce \$4,358.12, making a total for the two months of other items of passenger train revenue of \$11,865.72, as compared with distribution made on basis of expenses by Mr. Hillman of \$13,727.48.

Mr. Hillman's exhibit No. 6, intra-state passenger statement, for May, 1910, and November, 1909, Norfolk & Western Railway, should be revised to read as follows:

Passenger Revenue (Passengers only) Pocahontas district	\$31,109.86
Kenova District	17,285.91

"Other Passenger Train Revenue": .

Total \$17,764.06 for Pocahontas District, West Va., 94.4%, \$16,769.27 x 44.7% Revenue Basis	7,507.60
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Total Kenova to Williamson, all West Virginia, \$8,246.21 x 52.85% Revenue Basis.....	4,358.12
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\$60,261.49

Expenses as per Hillman Exhibit #4 \$57,904.83

Removal of Snow, Sand and Ice:

Pocahontas District	79.70
Kenova "	23.34
	<hr/>
	\$58,007.87

Operating Percentage	96.2602%
Taxes	4.0449
	<hr/>

Operating Expenses and Taxes..... 100.3051%

D. Q. 2. As I understand, Mr. Cox, as the result of your analysis of Mr. Hillman's exhibit in the event that he would adopt the basis of intra-state and inter-state passenger revenue for the division of the revenue derived from the by-products rather than the passenger expenses, then the cost to earn a dollar of passenger revenue, instead of amounting to 97.4203 per cent. would be 100.3051 per cent?

A. That is the case.

D. Q. 3. Now, with reference to this mode of ascertaining, or dividing up the revenue from by products has there been any general consensus of opinion among railroad accountants as to how that should be divided up?

A. I think there has been a general consensus of opinion that the mail, express and baggage follow the earnings of passengers, and I do not know of any other worker in this line who has adopted the expense basis; such a thing may have been done, but I have never heard of it.

D. Q. 4. You have never heard of any one except Mr. Hillman?

A. Yes. I will not say there is no other, but I know in many cases where earnings basis has been adopted, especially in court cases, so that I would say that the earnings basis would be almost the invariable rule.

D. Q. 5. Can you mention some railroad in which this mode of distributing this revenue from by-products is on the basis which you have suggested as the proper basis?

A. I recall a recent conference of a number of leading railroads of the country, and as an indication that the revenue basis is the more generally adopted and more appropriate method, reference is made to a series of recommendations adopted by a committee of accounting officers held at Chicago, October 3, 1912, in connection with the express investigation now before the Interstate Commerce Commission, in which it is suggested that any items of revenue, common to both classes of service, shall be divided on the percentage obtained by the combining of all other allocated items. The roads participating in this conference were some of the most prominent in the west:

Chicago, Burlington & Quincy R. R.
 Chicago & Northwestern R. R.
 Illinois Central R. R.
 Southern Ry.
 Louisville & Nashville R. R.
 Chicago, Rock Island and Pacific R. R.
 Baltimore & Ohio R. R.
 A. T. & S. F. R. R.
 Chicago, Milwaukee & St. Paul R. R.
 Northern Pacific R. R.
 Denver & Rio Grande R. R.
 Great Northern R. R.

D. Q. 6. Now, Mr. Coxe, I would ask you to turn to Mr. Hillman's exhibit No. 5. In this exhibit Mr. Hillman undertakes to ascertain the cost of doing intrastate freight business in West Virginia. I will ask you as a preliminary question whether you have ever been able to ascertain the cost of doing intra-state freight business in connection with any investigations you have taken part in concerning freight matters before the Interstate Commerce Commission, or before any of the State Corporation Commissions?

A. I do not recall any endeavor to formulate any plan of establishing the cost of intra-state freight business other than on the general plan of dividing the expenses on the basis of earnings.

D. Q. 7. In making up statements it has been conceded
 221 by every expert or other person connected with traffic affairs in this country that intra-state freight business is done at an excess cost over the entire freight business, is it not?

A. That is the generally accepted proposition.

D. Q. 8. Mr. Hillman states that there are two elements of this extra cost: One due to the fact that the intra-state business is subject to two terminal charges; and, secondly, that in this particular case it appears that the mileage of intra-state business is on an average of 25 miles, while inter-state business is on an average of 75 miles, and that hence it is only one-third of the haul over which to distribute the terminal charges, and based on these two elements of excess cost he proceeds to find out the cost of doing the freight business, and then expands the items on the theory that if all the business was done at the excess cost of intra-state business, then the cost would be expanded by the several amounts which he attaches to the items. I will ask you now, whether, in your judgment, the theory of ascertaining the cost of doing intra-state business in West Virginia, as exploited by Mr. Hillman in his exhibit No. 5, is in your judgment a safe mode of basing a conclusion as to the cost of doing intra-state freight business in West Virginia?

A. I would say in a general way that I believe Mr. Hillman's exhibit No. 5 fails to meet the situation owing probably to lack of
 222 information possessed by him when debating that point and in drawing up his form, and studying all the prominent features of the traffic on this part of the line impresses me with the fact that he has failed to size up the situation. Among the prominent points in connection with this business, I refer to

the month of May, 1910, as Mr. Hillman's exhibit is based on the figures in that month, and I think the month of November, 1909.

The intra-state business for the month of May, 1910, representing 13,046 tons was out of an aggregate of one million, five hundred, eighty-one thousand, five hundred and seventy-two tons, the intra-state business forming 0.82% of the entire number of tons handled on the line from Bluefield to Williamson.

Of the total number of intra-state tons of coal and coke, representing 4,108 tons, or 31.48 per cent, there went along with it merchandise amounting to 8938 tons, or a percentage of 68.52 per cent.

The total inter-state tonnage was 1,568,526, of which coal and coke represented 88.29 per cent. and merchandise represented 11.71 per cent.

As I think I have previously mentioned here, out of the entire tonnage mileage, Bluefield to Williamson, intra-state and inter-state, tons one mile, coal and coke represent 83 per cent.

The average haul for May was coal intra-state five miles, inter-state 46 miles; of the coke there was no intra-state traffic, and the average haul of coke inter-state was 66 miles. The average haul of merchandise intra-state was 29, and inter-state 75 miles.

The total intra-state tons one mile for the month of May was 280,710, while the total tonnage mileage was 82,905,813; the intra-state tonnage mileage representing 0.34 per cent.

Mr. Hillman's exhibit No. 5 purports to show the cost of doing intra-state freight traffic based upon freight expenses on the Pocahontas district as shown in his exhibit No. 2, which, for the months of May, 1910, and November, 1909, brought together on Mr. Hillman's exhibit No. 5, as \$550,779.20, and which Mr. Hillman expands to what he terms cost on basis of intra-state conditions, to \$999,384.07.

The aggregate tonnage mileage on the Pocahontas district for November, 1909, and May, 1910, was 170,625,446. Mr. Hillman therefore shows that \$999,384.07 divided by the tonnage mileage, 170,625,446, produces an average cost per ton per mile for intra-state freight of 5.8572 mills, whilst the actual average cost was \$550,779.20, divided by the aggregate tonnage mileage 170,625,446, or 3.23 mills.

This aggregate tonnage mileage is composed of, November, 1909, 87,719,633, and May, 1910, 82,905,813, a total of 170,625,446, of which coal and coke represents 142,369,416, or 83.5 per cent., leaving for merchandise 28,256,030, or 16.5 per cent.

Taking the month of May, 1910, as an illustration, the analysis shows that the intrastate business was represented by coal, 4,108 tons, and merchandise, 8,938 tons; that interstate traffic was composed of coal, 1,156,655 tons, coke 228,110 tons, merchandise 183,761 tons, a grand total of 1,581,572 tons; so that intrastate business out of this tonnage only represents 0.82%, whilst interstate traffic represents 99.18%.

Or, taking the tonnage mileage for May, 1910, the coal tonnage mileage on intrastate was 20,214 tons one mile, and interstate 53,-

699,162 tons one mile, making a total intrastate and interstate tonnage of 53,719,376 tons one mile of coal. There was no movement of coke intrastate, but coke interstate amounted to 15,052,293 tons one mile, and merchandise interstate amounted to 13,873,648 tons one mile, whilst the merchandise intrastate tons one mile was only 260,496. So that the entire tonnage mileage for the month of May, intrastate and interstate, was, intrastate 0.34%, and interstate 99.66%.

The average hauls are:

	Intrastate.	Interstate.
Coal	5 miles	46 miles
Coke	29	66 "
Merchandise	29 "	75 "

Taking the merchandise traffic alone for May, 1910, and eliminating for the time being the coal and coke, the percentage of traffic interchanged with branch lines was:

Intrastate merchandise	57%
Interstate merchandise	5%

In connection with the interstate merchandise traffic for
225 May, 1910,

Car load	359,387,043 pounds
Less car load	8,243,901 "
of the car load shipments, aggregating	359,387,043 lbs.
there originated and terminated beyond Bluefield and Williamson	317,250,000 "

With these facts it is evident that the Inter-state traffic was an unusually homogeneous one and the *the* expenses used in Mr. Hillman's exhibit #5 as the actual total freight expenses for November, 1909, and May, 1910, \$550,779.20, represented results based upon unusual conditions in the way of maximum results with minimum expenses. Had the same aggregate tonnage mileage accrued under

Intrastate conditions with the average hauls on coal	5 miles,
Merchandise	29 "

the number of tons would have increased to such an extent as to have rendered necessary a vast increase in plant, both as to equipment and yards. Train crews would have multiplied probably six times, with a vital increase in loss of car efficiency incident to short hauls, because so much more time would be consumed in cars standing to be loaded or unloaded as against moving a longer distance with one load.

Hillman Exhibit #5 underrates the cost of handling the business under Intra-state Conditions when it fails to expand these features in treatment of M. E. Account

25, Steam Locomotive Repairs, Road:

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34, Freight Train Car Repairs	
35, " " " Renewals and Depreciation;	
Conducting Transportation Account	80, Road Enginment
	81, Enginehouse expenses— Road;
	82, Fuel for Road Locomo- tives;
	83, Water for Road Locomo- tives.
	84, Lubricants Road loco- motives.
Conducting Transp't'n Account. . . .	85, Other supplies for Road Locomotives;
	88, Road Trainmen;
	89, Train Supplies and Ex- penses.

But allows them to remain as based upon a phenominally homo-
geneous movement indident to the Coal, Coke and Car-load Mer-
chandise movement.

D. Q. 9. Then, as I understand, Mr. Coxe, according to the
answer you have just given the supposed case made by Mr. Hillman
and which results in his expansion of certain items of cost in order to
ascertain the cost of doing intra-state business, is peculiarly and
singularly inapplicable to the conditions in West Virginia under
which the traffic of the Norfolk & Western Railway is conducted.
Am I right in the assumption contained in this question?

A. I should say so. It strikes me to replace that tonnage mileage
on all that inter-state merchandise and coal, with similar tonnage
mileage of freight handled under intra-state conditions, could hardly
be conceived of in West Virginia.

227 D. Q. 10. If you were to do the West Virginia business
which is now done under inter-state conditions, or try to per-
form that service, under intra-state conditions on the basis that Mr.
Hillman makes in his deposition, it would be attempting something
that is impossible, would it not?

A. That is the way I feel about it.

D. Q. 11. Have you been able to get your mind to consent to the
proposition advanced by Mr. Hillman that the excess cost of doing
intra-state freight business in West Virginia is measured by the
increase over general cost which he sets up in the exhibit which he
has filed, setting forth what in his judgment that intra-state freight
cost is?

A. The impression made upon me in studying his exhibit is that
Mr. Hillman has failed to consider properly the conditions surround-
ing this particular traffic in West Virginia; and that with that failure
he has failed to properly expand his expenses on those items that he
allows to remain undisturbed.

D. Q. 12. Now, without admitting the reasonableness or propriety

of Mr. Hillman's ascertainment of the cost, I will be glad to know whether you have made any estimate of what the cost of doing intra-state business in West Virginia would be on Mr. Hillman's theory; that is, in the event he had expanded the items of cost which he permitted to remain the same, in the same way in which he expanded the items which were expanded by him. If you have such
 228 an estimate as that, I will be glad if you will file the exhibit showing what it is and state what the result is?

A. I have taken the items which Mr. Hillman failed to expand, and have simply expanded them on the minimum expansion I could conceive of, which was the relative comparison of the haul.

Had Mr. Hillman expanded the actual costs of the following primary accounts as it is felt, under the conditions attending the handling of intra-state freight traffic as they exist on this part of the road, he should have done, then it is figured that his expanded costs as per exhibit C. W. H. #5, shown as \$999,384.07 would have been increased as follows:

Acct.	Actual costs.	Expanded costs.
25-Steam Locomotive Repairs.....	\$61,000.00	\$120,000.00
34-Freight Train Car Repairs.....	52,588.03	157,764.15
35-R " " Renewals.....	3,226.44	9,679.32
36- " " Depreciation..	20,201.05	60,603.15
80-Road Enginemen.....	65,141.63	195,424.89
81-Enginehouse Expenses—Road...	10,020.18	30,060.54
82-Fuel for Road Locomotives.....	59,946.19	179,838.57
83-Water " " ".....	3,336.27	10,008.81
84-Lubricants " ".....	1,140.01	3,420.03
85-Other Supplies for Road Lo.....	1,622.03	4,866.09
88-Road Trainmen.....	54,033.05	162,099.15
89-Train Supplies & Expenses.....	2,960.46	8,881.38
	<hr/>	<hr/>
	\$335,215.34	\$942,646.08

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Forwarded	\$333,215.34	\$942,646.08
		<hr/> 335,215.34

		<hr/> \$999,384.07
Additional charges to be added.....		607,430.74

Total freight expenses adjusted to intrastate conditions.....		<hr/> 1,606,814.81
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The additional expense aggregating \$606,430.74 are based upon the shorter haul of the intra-state traffic.

The expanded charges of \$1,606,814.81 divided by the total tonnage mileage of November, 1909, and May 1910, 170,625,446:

\$1,606,814.81

<hr/> 170,625,446	= Average cost of handling intra-state traffic per ton mile 9.4172 mills, as compared with Mr. Hillman's original estimate of 5.8572 mills.
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D. Q. 13. Mr. Coxe, I now ask you to turn to Mr. Hillman's Exhibit No. 7. In this exhibit, as I understand Mr. Hillman undertakes to ascertain the cost of doing both freight and passenger intra-state business in West Virginia, and for this purpose he combines
 230 the cost figures that he sets forth in Exhibit No. 5, which was intra-state freight business, and the figures ascertained by him in Exhibit No. 6, in which he undertakes to ascertain the cost of doing intra-state passenger business. The result of his Exhibit No. 7 is that all the business in West Virginia, intra-state freight and passenger, is shown to be done at an expense of 71.9553%, to which he adds 23.013% as an allowance for interest, dividends, etc., aggregating 94.9583%, which is the percentage as he claims of the cost of doing business in West Virginia combining inter-state and intra-state. You have already discussed his own theory, and have added what, in your judgment, a reasonable correction in regard to the cost would be, using his own theory as a basis for the correction. I now ask you to file and exhibit showing what the combined cost of these two classes of business in West Virginia, freight and passenger, would be as shown by the corrections which you think are reasonable to be made from Mr. Hillman's figures, using his own theory as a basis of calculation.

A. Mr. Hillman's exhibit No. 7 purports to show the cost of earning \$53,653.12 of Gross Revenue on intra-state passenger and freight traffic in West Virginia in May, 1910, and he produces a per centage cost of 71.9553%.

One of the component items of this cost is the expense of intra state freight traffic, \$3,873.00, which is objected to, as explained in the criticism of Mr. Hillman's Exhibit No. 5. There is also included in this statement of Mr. Hillman's the items for passenger revenue on the Pocahontas District intra-state for May
 231 \$4,654.85, and the Kenova division intra-state for May \$2,514.90, which Mr. Hillman obtained by applying to the total "Other Passenger Revenue" the percentages based upon expenses as criticised in his exhibit No. 6.

Pocahontas District, other items of passenger train
 revenue, \$8,794.79 x 52.9294%..... \$4,654.85

It is claimed this amount of \$8,794.79 should be divided between intra and inter-state on basis of passenger revenue from intra and inter-state: thus, on the Pocahontas District for May, 1910:

Intra-state Passenger Revenue (Passenger only)	\$17,672.18—46.904%
Total	37,677.45
Therefore, the "Other items of Passenger train revenue	8,794.79
46.904%—other items of Passenger Train Revenue, intra-state	4,125.10

232 Similarly on the Kenova District: May 1910.

Intra-state Passenger Revenue (Passengers only)	\$9,203.59—54.003%
Total	17,042.64

Therefore the total "Other items of Passenger Train Revenue," May, 1910, Kenova District (as shown in criticism of Hillman Exhibit #6) \$4,274.54 x 54.003%—Intra state Other items of Passenger Revenue

\$2,308.38

With those corrections made, Mr. Hillman's exhibit #7 would read; May, 1910:

Intra-state Passenger Revenue, Pocahontas	
Dist.	\$17,672.18
Other	4,125.10
Intra-state	
Kenova Dist.	9,203.59
Other	2,308.38
Intra-state freight Revenue, West Virginia, May, 1910	19,365.00
Other Operating Revenue, Pocahontas and Kenova districts	242.60
Total Intra-state Earnings, May, 1910	\$52,916.85
Passenger Operating Expenses for May, 1910, Pocahontas District, as per Hillman Exhibit #3	32,116.66
Freight Operating Expenses as worked by Mr. Hillman in Exhibit- #5 and 7	3,873.00
Taxes	2,616.66
	38,606.32

233 Percentage of Cost..... 72.957%

On page 61 of Record, Mr. Hillman refers to examination of 14th Annual Report of the N. & W. Ry. for June, 1910, and shows that Interest Rates, Hire of Equipment, Rents of Tracks, Yards & Terminals and Dividends at 5% on Common Stock and 4% on Preferred, and excluding taxes, considered above, would consume of the Gross Operating Revenue.....

23.013#

95.970%

And on page 135 of Record, states that if 6% had been allowed on Common Stock there would be added.....

1.877

97.847%

Taking a period of 5 years, 1903-1910, inc., the proportion of Gross Operating Revenue necessary to allow 6% on Common Stock and pay the Interest charges, Rents, etc., specified above, would be.....	28.800%
Which added to the revised percentage cited above..	72.957
	<hr/>
	101,757%

with no provision for expenditures for Additions and Betterments.

234 On sheet #1 Exhibit L-1 of this criticism of Mr. Hillman's Exhibit #7, is shown the original percentage of operating revenue consumed by operating expenses on Passenger and Freight Traffic in West Virginia:

Total Intra-state expenses and taxes as originally figured by Mr. Hilman	\$38,606.32	
	<hr/>	= 71.9553%
Total intra-state Earnings	\$53,653.12	

On sheet #2 is shown what this percentage would be if the method is adopted of distributing the item of "Other Passenger Train Earnings" on basis of Revenue from Intra and Inter-state Passengers, and using Mr. Hillman's Cost of handling Intra-state freight traffic under intra-state conditions as figured in his Exhibit #5:

Total Intra-state Expenses and Taxes....	\$38,606.32	
" " " Earnings	\$52,916.85	= 72.957%

Under the revision of Hillman Exhibit #5 as revised by J. W. C., the expanded freight expenses show a cost per ton per mile on Intra-state Freight of..... 9.4172 mills
And applying this to the West Virginia Intra-state tons—one-mile for May, 1910; 650,968 x 9.4172 mills, we have as the cost..... \$6,215.05

Instead of the amount as shown by Mr. Hillman of	\$3,873.00	
Adding the intra-state Passenger expenses as per Hillman Exhibit #3.....	32,116.66	
Taxes	2,616.66	
	<hr/>	

235 Total Operating Expenses and Taxes on Intra-state Traffic, Passenger and Freight..... \$40,948.37

Gross Earnings, intra-state, Passenger and freight..... 52,916.85

Therefore: $\frac{\$40,948.57}{\$52,916.85}$ = Percentage of Operating Expenses and Taxes.....	77.382%
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On page 61 of Record of March, 1912, depositions, Mr. Hillman refers to the percentage of Gross Revenues for year ending 6-30-1910 consumed by Interest, Rents, Hire of Equipment, Rents of Tracks, Yards and Terminals, and Dividends at 4% on preferred and 5% on Common (and excluding Taxes previously considered)

23.013

 100.395%

And on page 136 of Record, states that if 6% Dividend had been allowed on Common Stock, there should be added

1.877

 102.272%

which means that the Intra-state Passenger and Freight traffic, to earn its operating expenses, taxes and its share of the Interest on Bonds and Stock, would cost \$1.02272 to earn \$1.00, and which no provision for that class of Additions and Betterments which should be provided from Income rather than be capitalized.

236 D. Q. 14. The result of your analysis and correction of Mr. Hillman's exhibit No. 7 is that if the Common Stock of your Company is allowed to return five per cent. on this class of business, then, even under Mr. Hillman's theory of accounting more than 100 per cent of the earnings, and that is to say, to be more accurate, 100.395% of the earnings would be consumed. In other words, the earnings would fail to provide for the expenses and pay five per cent. on the Common stock by .395 per cent?

A. Yes, sir.

D. Q. 15. In the event, however, that it was deemed reasonable that an investor in the stock of a railroad company should have a return of six per cent. on his investment then the earnings from West Virginia intra-state business would fail to earn for such stock holder six per cent. by 2.272%, is that right?

A. Yes, sir.

D. Q. 16. In addition, in each case, there would, under this system of accounting, be no allowance made for additions and betterments, or the accumulation of a surplus by the railway company to tide over disasters or lean years, is that a fact?

A. That is a fact. No allowance whatever would be made for additions and betterments, which should be paid for out of income.

D. Q. 17. My understanding is that in making this estimate you did not by so doing in any way endorse the theory that Mr. Hillman has advanced, nor did you admit that he has discovered a formula for the ascertainment of the cost of doing intra-state business,

237 am I right in what my question implies?

A. I should say that your question was about properly stated, and that I feel Mr. Hillman has failed to properly size up the situation.

D. Q. 18. After all, Mr. Coxe, is not Mr. Hillman's statement and calculation based upon the earnings of this company for the year

1910, which, as you have stated in your deposition, was a banner year for the company in the way of earnings, an improper one? And will you not also state whether in your judgment it would be fair to take a year giving the best conditions as a basis to consider a rate proposition, such as the earnings of 1910?

A. No. I would say that for the year 1906 the operating revenue was \$28,000,000, for 1907 \$31,000,000, and 1908 \$29,000,000, and 1909 \$29,000,000, and 1910 \$35,000,000. It will therefore be seen that 1910 was a banner year from 1906 up to that time, and I feel that it is hardly a fair proposition to take a year of that character upon which to base a rate result.

D. Q. 18. That is all I wish to ask Mr. Coxé in rebuttal.

Cross-examination.

By Mr. CONLEY:

X Q. 1. Mr. Coxé, what express company operates over the Norfolk & Western Railway lines?

A. The Southern Express Company.

X Q. 2. Do you report your passenger earnings to that company?

A. Do we report our passenger earnings?

238 X Q. 3. Yes?

A. No, sir.

X Q. 4. Then they do not base their payments to you for express business on your passenger earnings, do they?

A. No, sir. Our contract provides that we shall receive a certain proportion of the gross collections which the express company makes.

X Q. 5. If your passenger earnings should increase, would you get from the United States Government any extra compensation for carrying the mail?

A. If the passenger business should increase?

X Q. 6. Yes.

A. The chances are that if the passenger business should increase the mail business would increase also, and when the weighing of the mail took place we would get the benefit thereof.

X Q. 7. Without any increase in the weight of the mail?

A. No, sir. It would be necessary to have an increase in the weight of the mail in order to get an increase in compensation.

X Q. 8. An increase in the weight of mail would not depend upon an increase in the number of passengers carried, would it?

A. I would say that with the growth of the passenger business the mail business would grow, that one follows the other.

X Q. 9. Do you mean to say by that that you would get more revenue from carrying mail if the passenger rate were three cents than if it were two cents?

239 A. Oh, no. I did not mean to indicate any such idea. But I said with the growth of the passenger business, even at the two cent rate, we might get more mail, because people create mail.

X Q. 10. The price you get for carrying mail is not dependent upon the fares you charge for the transportation of passengers?

A. No, they are two separate propositions.

X Q. 11. That is all.

(And no other questions being asked further this deponent saith not.)

Signature waived by agreement.

GEO. L. HART,
Notary Public.

240

Defendant's Surrebuttal.

C. W. HILLMAN, A witness heretofore introduced in chief on behalf of the defendant, and examined and cross-examined, is recalled for further examination in sur-rebuttal.

By Mr. CONLEY:

D. Q. 1. Mr. Hillman, are you the same gentleman referred to by Mr. Joseph W. Coxe in his testimony just closed?

A. Yes, sir.

D. Q. 2. Have you heard the statement made by Mr. Coxe in criticism of your testimony for the defendant in this case and exhibits filed with your testimony?

A. Yes, sir, I have.

D. Q. 3. What have you to say in answer to those criticisms?

A. In the first place I have to say in answer to his criticisms as to the division of byproducts of the passenger or freight business on the basis of passenger revenue or freight revenue, that it is entirely erroneous; that it is only adopted as a make-shift by railroad companies, and that it has no relation whatever to the amount earned in the handling of these byproducts save perhaps in the single item of station receipts from passengers, where the number of passengers using the facilities would have some effect upon the purchase of tickets or storage of baggage, which is one of the facilities;

241 that the trebling of accounts Nos. 25, 34, 35, 36, 80, 81, 82, 83, 84, 85, 88 and 89 upon my exhibit number 5 is totally erroneous, as these are expenses which accrued per mile moved, and to put them on the basis of per mile moved and then multiply them by three because they did not move the average mileage, would be totally erroneous.

As I stated in my direct testimony, I was unable to obtain the amount from the freight traffic intra-state or inter-state carried upon what is termed local trains, wherein the cost is very much increased over the cost of traffic carried on through trains per ton per mile, and that is confirmed by Mr. Cox in his rebuttal testimony here, when he says he is totally unable to give any figures concerning the amount of mileage of traffic so carried on through trains and local trains, inter-state.

Further than that, in the division of expenses I will state that probably of the various factors, if we should be compelled to use one factor, engine mileage would probably be the best single factor for the division of operating expenses between passenger and freight,

but that there is no one factor which can be used for the division of the joint expenses which accrue upon 116 accounts set up by the Interstate Commerce Commission, and that therefore these accounts must be analyzed and divided between freight and passenger, and between inter-state and intra-state, or whatever business is conducted, upon the basis of the factor which bears directly upon that particular expense. If it were otherwise there would be no consistency or sense in creating 116 expense accounts.

D. Q. 4. That is all.

Cross-examination.

By Mr. COCKE:

X Q. 1. Mr. Hillman, how do you ascertain the capital devoted to intra-state passenger trains?

A. On the basis of expenses.

X Q. 2. What was the capital you ascertained and used in this case?

A. I did not use any capital at all in my analyses. I simply determined the operating expenses.

X Q. 3. Did you ever find out what was the capital, which, according to your theory was used by the Norfolk & Western Railway Company in West Virginia?

A. I made no computation; no, sir. If I should do so I will say that I would take it upon the expense basis.

X Q. 4. I have always understood you put it upon that basis. State precisely how you would ascertain it on the expense basis.

A. I would determine the total value of the property in the state of West Virginia. I would then take the expense account as I have determined, and find the relation of each one of those expense accounts to the total expenses in West Virginia and assign that percentage of the capital to the business in hand.

243 X Q. 5. And you worked on this case for the purpose of coming to a conclusion as to whether or not the two cent rate was a fair and just one to the Norfolk & Western Railway Company without ever ascertaining what was the capital that the Norfolk & Western had invested in this business upon which it was entitled to a return?

A. No, sir; I was not employed to find out whether the rate was just or unjust. I was employed to ascertain what the expenses were for passenger, and what the expenses were for freight, and the taxes the same way. My employment went no further, and I think my testimony went no further than that.

X Q. 6. That is all.

(And no other questions being asked further this deponent saith not.)

Signature of witness waived by agreement of counsel.

244 STATE OF VIRGINIA,
City of Roanoke, To wit:

I, Geo. L. Hart, a Notary Public, in and for the State of Virginia, City of Roanoke, do hereby certify that the foregoing depositions of Joseph W. Coxe, for complainant, and C. W. Hillman, for Defendant, were duly taken at the time and place stated in the caption thereto by agreement of counsel, and for the purpose stated in the caption to the depositions taken on the fourth day of October, 1910, and that the signatures of the witnesses were waived.

Given under my hand and Notarial Seal this third day of February, 1913.

GEO. L. HART,
Notary Public.

My Term of Office Expires December 12, 1916.

By the Laws of Virginia no tax is required upon this seal.

(Here follow pasters, marked pages 245-251.)